153 US 564

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RECORD, CASE No. 14,170.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 194

HENRY M. LOUD, PLAINTIFF IN ERROR,

vs.

THE POMONA LAND AND WATER COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED SEPTEMBER 25, 1890.

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	1
Proof of service of citation	3	2
Bond on writ of error	4	2
Præcipe for summons	7	4
Security for costs	8	4
Summons	9	4
Marshal's return	10	5
Præcipe for alias summons	11	5
Alias summons	12	5
Marshal's return	12	6
Order granting leave to file declaration	13	6
Declaration	14	7
Præcipe for appearance of defendant	268	150
Entry of appearance of defendant	269	150
Proof of service of declaration and bill of particulars	270	151
Demurrer	275	153
Joinder in demurrer	276	154

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 21, 1893.

	Original.	Print.
Stipulation as to depositions, &c.	277	154
Order sustaining demurrer as to certain counts	278	155
Order beginning trial	279	155
Order continuing trial	280	155
Order continuing trial	281	156
Verdict and order for stay	282	156
Motion for new trial	283	157
Order beginning hearing of motion for new trial	285	158
Order submitting motion for new trial	286	158
Judgment	287	158
Stipulation as to time to settle bill of exceptions, &c.	289	159
Order extending time to settle bill of exceptions	290	159
Stipulation extending time to settle bill of exceptions	291	160
Order extending time to settle bill of exceptions	292	160
Stipulation extending time to settle bill of exceptions	293	161
Order extending time to settle bill of exceptions	294	161
Stipulation extending time to settle bill of exceptions	295	161
Order extending time to settle bill of exceptions	296	162
Bill of exceptions	297	162
Testimony of Frank L. Palmer	297	162
John A. Woy	298	163
Motion for nonsuit overruled	300	164
Defendant's offers	301	164
Testimony of Frank L. Palmer (recalled)	302	165
Henry M. Loud	316	174
Frank L. Palmer (recalled)	322	178
Defendant's requests	323	178
Charge to jury	330	182
Judge's certificate	330½	182
Exhibit 1—Application for purchase, April 15, 1887	330½	183
2—Application for purchase, April 15, 1887	331	183
3—Application for purchase, April 15, 1887	333	184
4—Application for purchase, April 15, 1887	334	185
5—Application for purchase, April 15, 1887	336	186
6—Application for purchase, April 15, 1887	337	187
7—Application for purchase, April 15, 1887	338	188
8—Application for purchase, April 15, 1887	340	188
9—Application for purchase, April 8, 1887	341	189
11—Articles of incorporation of The Pomona Land and Water Company	343	190
12—Articles of incorporation of The Irrigation Company of Pomona	345	191
13—Articles of incorporation of The Del Monte Irrigation Company	348	193
14—Articles of Incorporation of The Palomares Irrigation Company	350	195
15—By-laws of The Irrigation Company of Pomona	352	196
16—By-laws of The Del Monte Irrigation Company	358	200
17—By-laws of The Polomares Irrigation Company	372	203
18—Map of Pomona and vicinity	377	206
19—Resolution of Pomona Land and Water Company, September 5, 1884	379	206

	Original.	Print.
Exhibit 19—Deed from Pomona Land and Water Company to Chas. W. Brown, September 5, 1884	380	206
20—Resolution of Pomona Land and Water Company, June 10, 1885	383	208
Deed from Pomona Land and Water Company to Alfred H. Smith, June 10, 1885	384	209
Resolution of Pomona Land and Water Company, March 12, 1887	387	210
Deed from Pomona Land and Water Company to W. B. Stewart *et al.*, March 9, 1887	388	211
Resolution of Pomona Land and Water Company, May 2, 1887	391	213
Deed from Pomona Land and Water Company to A. S. Hartwell, May 2, 1887	393	214
Resolution of Pomona Land and Water Company, December 14, 1887	396	215
Deed from Pomona Land and Water Company to S. L. Dodge, December 14, 1887	397	216
21—Contract between The Irrigation Company and The Pomona Land and Water Company, July 31, 1886	401	219
22—Certificate for sixty-five shares of stock of The Irrigation Company of Pomona in the name of H. M. Loud, dated July 24, 1889	403	220
23—Agreement between The Pomona Land and Water Company and William Thomas *et al.*, November 16, 1886	404	220
Exhibit C—Form of contract	409	223
D—Form of contract	413	225
Amendment to agreement, February 4, 1887	417	227
Agreement as to prices, March 16, 1887	418	228
Agreement as to prices, April 12, 1887	419	228
24—Certificate for one hundred and twenty-six shares of stock of the Del Monte Irrigation Company in the name of H. M. Loud, dated July 24, 1889	419	229
25—Certificate for two hundred shares of stock of the Palomares Irrigation Company in the name of H. M. Loud, dated July 24, 1889	420	230
26—Certificates of recorder, judge, and clerk of Los Angeles county	421	230
Assignment of errors	424	231
Clerk's certificate	431	234

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Pomona Land and Water Company, a corporation organized under the laws of California, as plaintiff, and Henry M. Loud, as defendant, a manifest error hath happened, to the great damage of the said Henry M. Loud, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, Eastern District of Michigan.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fifth day of July, in the year of our Lord one thousand eight hundred and ninety.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States for the Eastern District of Michigan.

Allowed by—
H. B. BROWN, *Dist. Judge.*

[Endorsed:] 7739. Pomona Land & Water Co. *v.* Henry M. Loud. Writ of error. Filed July 5, 1890. Walter S. Harsha, clerk.

2 The United States of America to Pomona Land and Water Company, a corporation organized under the laws of California, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein Henry M. Loud is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, district judge of the

district court of the United States, holding said circuit court, this fifth day of July, in the year of our Lord one thousand eight hundred and ninety.

HENRY B. BROWN,
District Judge.

3 [Endorsed:] 7739. Circuit court of the United States for the eastern district of Mich. Pomona Land & Water Co. *vs.* Henry M. Loud. Citation & proof of service. Filed July 5, 1890. Walter S. Harsha, clerk.

STATE OF MICHIGAN, } ss:
County of Wayne, }

On this fifth day of July, in the year of our Lord one thousand eight hundred and ninety, personally appeared Gilbert M. Stark before me, the subscriber, a notary public in and for said county, and makes oath that he delivered a true copy of the within citation to Henry M. Duffield personally at his office, in Detroit, Michigan.

GILBERT M. STARK.

Sworn to and subscribed the fifth day of July, A. D. 1890.
WALTER S. HARSHA,
Notary Public, Wayne Co., Mich.

4 *Bond on Writ of Error.*

Know all men by these presents that we, Henry M. Loud, as principal, Henry N. Loud, Edward F. Loud, William F. Loud, George A. Loud, of Oscoda, and Andrew W. Comstock, of Alpena, Michigan, as sureties, are held and firmly bound unto Pomona Land and Water Company, a corporation organized under the laws of California, in the full and just sum of one hundred and twenty-five thousand dollars, to be paid to the said Pomona Land and Water Company, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, and that we, Henry N. Loud, Edward F. Loud, William F. Loud, George A. Loud, and Andrew W. Comstock, as sureties, are each held and firmly bound unto said Pomona Land and Water Company in the full and just sum of one hundred and twenty-five thousand dollars, to be paid to the said Pomona Land and Water Company, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, severally by these presents.

Sealed with our seals and dated this first day of July, A. D. 1890.

Whereas lately, at a session of the circuit court of the United States for the eastern district of Michigan, in a suit pending in said court between The Pomona Land and Water Company, plaintiff, and

Henry M. Loud, defendant, a judgment was rendered against said Henry M. Loud, and the said Henry M. Loud having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforsaid suit, and a citation directed to the said Pomona Land and Water Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Henry M. Loud shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation will be void; else to remain in full force and virtue.

H. M. LOUD. [SEAL.]
HENRY N. LOUD. [SEAL.]
EDWARD F. LOUD. [SEAL.]
WILLIAM F. LOUD. [SEAL.]
GEORGE A. LOUD. [SEAL.]
A. W. COMSTOCK. [SEAL.]

Sealed and delivered in the presence of—
H. O. NIGHTINGALE.
FORREST C. EBLING.
J. B. COMSTOCK.

Approved July 5th, 1890.

H. B. BROWN.

STATE OF MICHIGAN, } ss:
County of Alpena, }

A. W. Comstock, being duly sworn, says that he executed the foregoing bond; that he is a freeholder in Alpena county and is worth ($500,000.00) five hundred thousand dollars in property subject to execution over and above all indebtedness and liabilities.

A. W. COMSTOCK.

Sworn to and subscribed before me this 3rd day of July, A. D. 1890.

JOSEPH B. COMSTOCK,
[SEAL.] *Notary Public, Alpena Co., Mich.*

STATE OF MICHIGAN, } ss:
County of Iosco, }

Henry N. Loud, George A. Loud, Edward F. Loud, and William F. Loud each, being duly sworn, says that he executed the foregoing bond, and that each is a freeholder in Iosco county, and that each is severally worth the sum of one hundred and twenty-five thousand dollars in property subject to execution over and above all indebtedness and liabilities.

HENRY N. LOUD.
GEORGE A. LOUD.
EDWARD F. LOUD.
WILLIAM F. LOUD.

Subscribed and sworn to before me this second day of July, A. D. 1890.

HENRY O. NIGHTINGALE,
[SEAL.] *Notary Public in and for Iosco Co., Mich.*

7 *Præcipe for Summons.*

In the Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY, a Corporation Organized under the Laws of and a Citizen of the State of California, Pl'ff,
vs.
HENRY M. LOUD, a Citizen of Michigan and Resident of the Eastern District Thereof, Def't.

Let a writ of summons in an action of assumpsit issue in the above-entitled cause, claiming damages in the sum of one hundred thousand dollars ($100,000).

HENRY M. DUFFIELD,
Pl'ff's Att'y.

Filed August 20th, 1889.

WALTER S. HARSHA, *Clerk*,
By D. J. DAVISON, *Dep. Cl'k.*

8 *Security for Costs.*

Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY, Pl'ff,
vs.
HENRY M. LOUD, Def't.

I hereby acknowledge myself security for the payment of all costs for which the plaintiff may become liable in the above-entitled suit.

HENRY M. DUFFIELD.

Dated August, 1889.

Filed August 20th, 1889.

WALTER S. HARSHA, *Clerk*,
By D. J. DAVISON, *Dep. Cl'k.*

9 *Summons.*

The President of the United States of America to the marshal of the eastern district of Michigan, Greeting:

You are hereby commanded that you summon Henry M. Loud, a citizen of the State and resident of the eastern district of
[SEAL.] Michigan, if he shall be found in your district, to be and appear in the circuit court of the United States of America

for the eastern district of Michigan, to be held at Detroit, in said district, before the judges of the said court on the 27th day of August instant, to answer unto Pomona Land and Water Company, a corporation organized under the laws of and a citizen of the State of California, in a plea of trespass on the case upon promises, to its damage one hundred thousand dollars, and have you then and there — writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of August, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and fourteenth.

WALTER S. HARSHA, *Clerk*,
By D. J. DAVISON, *Dep. Cl'k.*

Filed August twenty-seventh, A. D. 1889.

WALTER S. HARSHA, *Clerk*,
By D. J. DAVISON, *Dep. Cl'k.*

10 *Proof of Service.*

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that I have made diligent search for Henry M. Loud, defendant within named, and that I am unable to find said Henry M. Loud in my bailiwick and cannot make service of within summons as I am commanded.

G. PENNELL, *Marshal.*

11 *Præcipe for Alias Writ of Summons.*

United States Circuit Court, Eastern District of Michigan.

POMONA LAND AND WATER COMPANY, Plaintiff,
vs.
HENRY M. LOUD, Defendant.

To the clerk:

Please issue an alias writ of summons in the above-entitled cause, returnable on the first Tuesday of September next.

HENRY M. DUFFIELD,
Att'y for Pl'ff.

Aug. 27th, 1889.

Filed August 27th, 1889.

WALTER S. HARSHA, *Clerk*,
By D. J. DAVISON, *Dep. Cl'k.*

12 *Alias Summons.*

The President of the United States of America to the marshal of the eastern district of Michigan, Greeting:

You are hereby commanded, as you have once before been commanded, that you summon Henry M. Loud, a citizen of
[SEAL.] the State and resident of the eastern district of Michigan, if he shall be found in your district, to be and appear in

the circuit court of the United States of America for the eastern district of Michigan, to be held at Detroit, in the said district, before the judges of the said court, on the third day of September next, to answer unto Pomona Land and Water Company, a corporation organized under the laws of and a citizen of the State of California, in a plea of trespass on the case upon promises, to its damage one hundred thousand dollars, and have you then and there — writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of August, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and fourteenth.

WALTER S. HARSHA, *Clerk.*
D. S. DAVISON, *Dep. Clk.*

Filed third day of September, 1889.

WALTER S. HARSHA, *Clerk,*
By D. J. DAVISON, *Dep. Clerk.*

Proof of Service.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that upon the 30th day of August, A. D. 1889, I served the within writ on the within-named Henry M. Loud at Au Sable, in said district, by delivering to him personally a true copy thereof, at the same time exhibiting to him this original with the seal of the court impressed therein and calling his attention to the same.

G. PENNELL, *Marshal,*
By C. H. MOORE, *Deputy.*

Service	21
198 miles	11 88
Copy	50
Fees	$14 38

13 *Order Granting Leave to File Declaration.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the twenty-sixth day of September, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Howell E. Jackson, circuit judge; the Honorable H. F. Severens, district judge, western district; the Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

Now, on application of Henry M. Duffield, Esq., attorney for said plaintiff, leave is granted to file a declaration herein as of the twenty-third day of September instant.

14 *Declaration.*

In the Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY, Plaintiff,
vs.
HENRY M. LOUD, Defendant.
} No. 7739.

STATE OF MICHIGAN,
Eastern District of Michigan, County of Wayne, } *ss:*

The Pomona Land and Water Company, a corporation duly organized under the laws and doing business in and a citizen of the State of California, plaintiff herein, by Henry M. Duffield, its attorney, complains of Henry M. Loud, who is a citizen of the State of Michigan and a resident of the eastern district thereof and who has been heretofore duly summoned to appear in this case, defendant herein, in a plea of trespass upon the case upon premises.

For that whereas the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the third day of May, A. D. 1887, entered into and signed an agreement in writing and under seal, dated the eighth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud," in the following words and figures, to wit:

15 Office of the Pomona Land and Water Company.

This agreement made the eight day of April, 1887, between Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and H. M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th, A. D. 1883, and in consideration of twenty-five hundred and thirty-nine dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of Los Angeles, State of California, to wit: Lot seventeen (17) of the northeast Pomona tract, according to map of said tract duly recorded in Book 5 page 461 of miscellaneous records of Los Angeles county, California, estimated to contain forty and $\frac{62}{100}$ acres of land together with 406.2 shares of stock of the Del Monte Irrigation Company representing four & $\frac{62}{100}$ inches of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party

of the second part, subject to the by-laws of the said Del Monte Irrigation Company, when payment in full is made for the above-described land.

16 The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the part- of the second part do covenant and agree to pay to the party of the first part, its successors or assigns, the sum of ten thousand one hundred and fifty-five dollars, U. S. gold coin, to be paid in the following manner:

$2,539 on or before delivery of this contract,
$3,808 on or before April 8th, 1888,
$3,808 on or before April 8th, 1889,
$—— on or before —— —, 188–,

and interest upon said respective sums from April 8th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

17 And the party of second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance or tender of all payments precedent thereto, the

party of the second part, his heirs or assigns shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 3rd day of May, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. F. NICHOLS.

18 And said plaintiff further saith that the said defendant afterward, to wit, on the third day of May, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of three thousand eight hundred and eight dollars ($3,808) on or before April 8th, 1888, and the further sum of three thousand eight hundred and eight dollars ($3,808) on or before April 8th, 1889, together with interest on said respective sums from April 8th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be at the option of said plaintiff added to the principal and to bear interest from the date of its maturity, at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein, in this, that the said defendant did not on or before the eighth day of April, A. D. 1888, pay to the said plaintiff the sum of three thousand eight hundred and eight dollars ($3,808) and interest thereon from the said eighth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of six hundred and nine dollars and twenty-eight cents ($609.28), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum; of all which the
19 said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And also that the said defendant made default in this, that said defendant did not on or before the eight- day of April, A. D. 1889,

pay to the said plaintiff the sum of three thousand eight hundred and eight dollars ($3,808) and interest thereon from said eight- day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of six hundred and nine dollars and twenty-eight cents ($609.28), was added to the principal, and thereafter bore like interest at eight (8) per cent. per annum; of all which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

20 And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with four hundred and six and two-tenths (406 & $\frac{2}{10}$) shares of stock of the Del Monte Irrigation Company, representing 4 and $\frac{62}{1000}$ inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract; of all which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof; by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterwards requested; and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be

21 thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of nine thousand five hundred dollars ($9,500).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the 30th day of March, A. D. 1887, entered into and signed another and different agreement, in writing and under seal, dated the twenty-fifth day of March, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement, made the 30th day of March, 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the city and county of San Francisco, California, party of the first part and H. M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th A. D. 1883, and in consideration of one hundred and eighty-eight (188) dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of Los Angeles, State of California, to wit:

22 Block 239 of the Pomona tract according to map of said tract duly recorded in Book 3 pp. 96 & 97 of miscellaneous records of Los Angeles county, *of* California, estimated to contain eight and $\frac{76}{100}$ acres, together with sixty-five (65) shares of stock of the Irrigation Company of Pomona, representing .65 of one inch of water under four-inch pressure measured from center of aperture, said stock to be delivered by party of first part and accepted by party of the second part subject to the by-laws of the said Irrigation Company of Pomona, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase of the above-described premises, the party of the second — does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of seven hundred and fifty dollars, U. S. gold coin, to be paid in the following manner:

$188 on or before delivery of this contract,
$281 on or before M'ch 30th, 1888,
$281 on or before M'ch 30th, 1889,
$— on or before ——, 18—,

and interest upon said respective sums from March 30th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

23 And the party of the second part, in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or

assessed during the pendency of this agreement on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit nor suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due, then it shall be lawful for the party of the first part, its successors or assigns, at their option, to rescind this agreement to convey, to re-enter upon and repossess said premises, and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent
24 thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 25th day of April, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President.*

[Seal of the Company.]

By CHAS. K. CLARK, *Secretary.*

H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—

—— ——.

— accept this and enter into possession of the land herein described, subject to and in accordance with the conditions and provisions hereinbefore contained, and — agree to pay the amounts as therein stipulated.

H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—

—— ——.

And said plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, at Detroit aforesaid, in United States gold coin, the sum of two hundred and eighty-one — ($281) on or before
25 March 30th, 1888, and the further sum of two hundred and eighty-one dollars ($281) on or before March 30th, 1889, together with interest on said respective sums from March 30th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be at the option of said plaintiff added to the principal, and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the thirtieth day of March, A. D. 1888, pay to the said plaintiff the sum of two hundred and eighty-one dollars ($281) and interest thereon from the said thirtieth day of March, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of forty-four dollars and ninety-six cents ($44.96), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the thirtieth day of March, A. D. 1889, pay to the said plaintiff the sum of two hundred and eighty-one dollars ($281) and interest thereon from the said thirtieth day of March, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract,
26 to wit, the sum of forty-four dollars and ninety-six cents ($44.96), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey, by deed of grant, bargain, and sale, to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with sixty-five (65) shares of stock of the Irrigation Company of Pomona, representing

$\frac{65}{100}$ of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract aforesaid and by him heretofore, as aforesaid, promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified, when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said de-
27 fendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of seven hundred dollars ($700).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the third day of May, A. D. 1887, entered into an*f* signed another and different agreement, in writing and under seal, dated the ninth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 9th day of April, 1877, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and H. M. Loud of Oscoda, Michigan, party of the second part, witnesseth, that in *a* pursuance of a resolution of its board of directors, adopted October 25th, A. D. 1883, and in consideration of twenty-three hundred and seventy-eight and seventy-five hundredths dollars ($2,378.75), paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part,
28 his heirs or assigns, the following-described real property, situated in the county of Los Angeles, State of California, to wit: Lot nineteen (19) of the northeast Pomona tract, according to map of said tract duly recorded in Book 5, page 461 of miscellaneous records of Los Angeles county, California, estimated to contain forty-two and $\frac{27}{100}$ acres of land together with 422.7 shares of stock of the Del Monte Irrigation Company representing 4 and $\frac{227}{1000}$ inches of water under four-inch pressure, measured from center

of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Del Monte Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of nine thousand five hundred and ten and $\frac{75}{100}$ dollars, U. S. gold coin, to be paid in the following manner:

$2,378.75 on or before delivery of this contract,
$3,566 on or before April 9th, 1888,
$3,566 on or before April 9th, 1889,
$— on or before —,

and interest upon said respective sums from April 9th, 1887, until paid, at the rate of eight per cent., payable annually; and not so paid, at option of said company to be added to principal and bear like interest.

29 And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of second part doing so, the party of the first part may pay the same, and before the final payment of purchase the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of con-

veyance, or tender of all payments precedent thereto, the
30 party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 3rd day of May, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY.
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. F. NICHOLS.

And said plaintiff further saith that the said defendant afterward, to wit, on the third day of May, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of three thousand five hundred and sixty-six dollars ($3,566) on or before April ninth, 1888, and the further sum of three thousand five hundred and sixty-six dollars ($3,566) on or before April ninth, 1889, together with interest on said respective sums from April ninth, 1887, until paid at the rate of eight (8) per cent.
31 per annum, payable annually, the said interest on each and all of said sums if not paid to be at the option of said plaintiff added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of three thousand five hundred and sixty-six dollars ($3,566) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of five hundred and seventy dollars and fifty-six cents ($570.56), was added to the principal, and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made

default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of three thousand five hundred and sixty-six dollars ($3,566) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of five hundred and seventy dollars and fifty-six cents ($570.56), was added to the principal,
32 and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs and assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with four hundred and twenty-two and seven-tenths (422 & $\frac{7}{10}$) shares of stock of the Del Monte Irrigation Company, representing 4 and $\frac{227}{1000}$ inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract aforesaid and by him heretofore, as aforesaid, promised to be made or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and being so liable he, the said defendant, in consideration thereof, afterwards, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and
33 herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of eight thousand five hundred dollars ($8,500).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration heretofore, to wit, on the third day of May, A. D. 1887, entered into and signed another and different agreement in writing and under seal, dated the ninth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement H. M. Loud, by J. E. McComas, his attorney-in-fact, in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 9th day of April, 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part and Henry M. Loud of Oscoda, Michigan, party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th A. D. 1883, and in consideration of twenty-two hundred and seventy-eight and $\frac{50}{100}$ dollars ($2,278.50), paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to — made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of Los Angeles State of California, to wit:

Lot twenty of the northeast Pomona tract according to map of said tract duly recorded in Book 5 page 461 of miscellaneous records of Los Angeles county, California, estimated to contain forty and $\frac{50}{100}$ acres of land together with 405 shares of stock of the Del Monte Irrigation Company representing four and $\frac{5}{100}$ inches of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of second part, subject to the by-laws of the said Del Monte Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of nine thousand one hundred and twelve and $\frac{50}{100}$ dollars in U. S. gold coin, to be paid in the following manner:

$2,278.50 on or before delivery of this contract,
$34.17 on or before April 9th, 1888,
$34.17 on or before April 9th, 1889,
$— on or before —— —, 188–,

and interest upon said respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually: and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described

premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the *of the* second part. And it is hereby expressly covenanted and agreed between the parties hereto,
36 that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the part- of the second part ha- hereunto set — hand and seal this 3rd day of May, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.

H. M. LOUD, [L. S.]
By J. E. McCOMAS, *His Attorney-in-fact*.

Sealed and delivered in the presence of—
C. P. NICHOLS.

And the said plaintiff further avers that the said J. E. McComas was fully authorized and empowered by the said defendant, Henry M. Loud, to sign said agreement in his behalf, and that the said defendant, Henry M. Loud, knew of and authorized the signing of said contract in his name by the said J. E. McComas as his attorney-in-fact.

And the said plaintiff further saith that the said defendant afterward, to wit, on the third day of May, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then
37 and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of three thousand four hundred and seventeen dollars ($3,417) on or before the 9th day of April, 1888, and the further sum of three thousand four hundred and seventeen dollars ($3,417) on or before April 9th, A. D. 1889, together with interest on said respective sums from April 9th, 1887, until paid at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums if not paid to be at the option of said plaintiff added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of three thousand four hundred and seventeen dollars ($3,417) and interest thereon from the ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of five hundred and forty-six dollars and seventy-two cents ($546.72), was added to the principal, and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said
38 plaintiff the sum of three thousand four hundred and seventeen dollars ($3,417) and interest thereon from the ninth day of April, 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of five hundred and forty-six dollars and seventy-two cents ($546.72), was added to the principal, and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs, or assigns the property described in said contract and situated in the county of Los Angeles, in the State of California, together with four hundred

and five shares of stock of the Del Monte Irrigation Company, representing four and $\frac{5}{1000}$ inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payment called for in said contract aforesaid and by him heretofore as aforesaid promised to be made or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-
39 mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto requested, and being so liable he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of eight thousand five hundred dollars ($8,500).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the third day of May, A. D. 1887, entered into and signed another and different agreement in writing and under seal, dated the ninth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 9th day of April, 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and H. M. Loud of Oscoda, Michigan, party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th A. D. 1883, and in consideration of seventeen hundred and six dollars ($1,706) paid by the party of the second part, the party of the first part does covenant and agree that after making of
40 the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following real described property, situated in the county of Los Angeles, State of California, to wit:

North half and southeast quarter of lot twenty-three (23), of the northeast Pomona tract, according to map of said tract duly recorded in Book 5 page 461 of miscellaneous records of Los Angeles county, California, estimated to contain twenty and $\frac{32}{100}$ acres of land together with 303.2 shares of stock of the Del Monte Irrigation Com-

pany representing $3\frac{32}{1000}$ inches of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Del Monte Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of six thousand eight hundred and twenty-two dollars, U. S. gold coin, to be paid in the following manner:

$1,706 on or before delivery of this contract,
$2,558 on or before April 9th, 1888,
41 $2,558 on or before April 9th, 1889,
$— on or before —— —, 188–,

and interest upon said respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy, and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises, and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and
42 liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part.

And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be con-

strued as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 3rd day of May, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. S. NICHOLS.

And the said plaintiff further saith that the said defendant afterward, to wit, on the third day of May, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay
it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit
43 aforesaid, in United States gold coin, the sum of two thousand five hundred and fifty-eight dollars ($2,558) on or before April ninth, 1888, and the further sum of two thousand five hundred and fifty-eight dollars ($2,558) on or before April ninth, 1889, together with interest on said respective sums from April ninth, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of two thousand five hundred and fifty-eight dollars ($2,558) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of four hundred and nine dollars and twenty-eight cents ($409.28), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit

aforesaid; and also that the said defendant made default in this, that the said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of two thousand five hundred and fifty-eight dollars ($2,558) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight
44 per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of four hundred and nine dollars and twenty-eight cents ($409.28), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county — Los Angeles, in the State of California, together with three hundred and three and two-tenths (303 & $\frac{2}{10}$) shares of stock of the Del Monte Irrigation Company, representing three and thirty-two one thousandths ($3\frac{32}{1000}$) inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable,
45 he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of six thousand five hundred dollars ($6,500).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the third day of May, A. D. 1887, entered into and signed another and different agreement in writing and under seal, dated the ninth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 9th day of April, 1887 between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and Henry M. Loud of Oscoda, Michigan, party of the second part, witnesseth, that in *a* pursuance of a resolution of its board of directors, adopted October 25th A. D. 1883, and in consideration of fifteen hundred and thirty-six and $\frac{50}{100}$ dollars ($1,536.50), paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance
46 of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of Los Angeles State of California, to wit:

Lot twenty-four (24) of the northeast Pomona tract, according to map of said tract duly recorded in Book 5, page 461 of miscellaneous records of Los Angeles county, California, estimated to contain twenty-seven and $\frac{50}{100}$ acres of land together with 273 shares of stock of the Del Monte Irrigation Company representing two and $\frac{73}{100}$ inches of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Del Monte Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of six thousand one hundred and forty-two and $\frac{50}{100}$ dollars, U. S. gold coin, to be paid in the following manner:

$1,536.50, on or before delivery of this contract,
$2,303, on or before April 9th, 1888,
47 $2,303 on or before April 9th, 1889,
$— on or before —— —, 188–,

and interest upon said respective sums from April 9th until paid, at the rate of eight per cent. per annum, payable annually: and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described prem-

ises, do further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of the purchase-money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon: and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises, and all improvements then existing thereon: removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of
48 the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 3rd day of May, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. F. NICHOLS.

And said plaintiff further saith that the said defendant afterward, to wit, on the third day of May, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit,

Pomona, to wit, at Detroit aforesaid, in United States gold
49 coin, the sum of two thousand three hundred and three dollars ($2,303) on or before April 9th, 1888, and the further sum of two thousand three hundred and three dollars ($2,303) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums if not paid to be at the option of said plaintiff added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of two thousand three hundred and three dollars ($2,303) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of three hundred and sixty-eight dollars and forty-eight cents ($368.48), was added to the principal, and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also the said defendant made default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of two thousand three hundred and three dollars ($2,303) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the
50 same or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of three hundred and sixty-eight dollars and forty-eight cents ($368.48), was added to the principal, and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expresed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with two hundred and seventy-three (273) shares of stock of the Del Monte Irrigation Company, representing 2 and $\frac{73}{100}$ inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant had negligently re-

fused as aforesaid to make said payments called for in said contract aforesaid and by him heretofore as aforesaid promised to be made or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested,

51 and being so liable he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of six thousand dollars ($6,000).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, entered into and signed another and different — in writing and under seal, dated the ninth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 9th day of April, 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the city and county of San Francisco, California, party of the first part, and H. M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th, 1883, and in consideration of four hundred (400) dollars, paid by the party of second part, the party of the first part does covenant and agree that

52 after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of Los Angeles, State of California, to wit:

Block 209 of the Pomona tract according to map of said tract duly recorded in Book 3, pp 96 & 97 of miscellaneous records of Los Angeles county, California, estimated to contain twenty-two and $\frac{8}{100}$ acres, together with sixty-eight (68) shares of stock of the Irrigation Company of Pomona, representing $\frac{68}{100}$ of one inch of water under four-inch pressure measured from center of aperture, said stock to be delivered by party of first part and accepted by party of second part subject to the by-laws of the said Irrigation Company of Pomona, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right

to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of twelve hundred dollars, U. S. gold coin, to be paid in the following manner:

$400 on or before the delivery of this contract,
$400 on or before April 9th, 1888,
$400 on or before April 9th, 1889,
$— on or before —— —, 188–,

53 and interest upon said respective sums from April 9th 1887 until paid, at the rate of eight per cent. per annum, payable annually: and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part, in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and *and* agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of the agreement on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of the purchase-money the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit nor suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due, then it shall be lawful for the party of the first part, its successors or assigns, at their option, to rescind this agreement to convey, to re-enter upon and repossess said premises, and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of

54 the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by its president

and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 25th day of April 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By CHAS. K. CLARK, *Secretary*.
H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. S. NICHOLS.

— accept this and enter into possession of the land herein described, subject to and in accordance with the conditions and provisions hereinbefore contained, and — agree to pay the amounts as therein stipulated.

H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. S. NICHOLS.

55 And the said plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of four hundred dollars ($400) on or before April 9th, 1888, and the further sum of four hundred dollars ($400) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the 9th day of April, A. D. 1888, pay to the said plaintiff the sum of four hundred dollars ($400) and interest thereon from the said 9th day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-four dollars ($64), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant
56 made default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff

the sum of four hundred dollars ($400) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-four dollars ($64), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with sixty-eight (68) shares of stock of the Irrigation Company of Pomona, representing $\frac{68}{100}$ of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract last aforesaid and by him heretofore, as aforesaid, promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-
57 mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand dollars ($1,000).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, entered into and signed another and different agreement in writing and under seal, dated the ninth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 9th day of April, 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the city and county of San Francisco,

California, party of the first part, and H. M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th, A. D. 1883, and in consideration of four hundred and sixty-six dollars ($466), paid by the party of the second part, the party of the
58 first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of Los Angeles, State of California, to wit:

North half (N. ½) of block 210 of the Pomona tract according to map of said tract duly recorded in Book 3 pp. 96 & 97 of miscellaneous records of Los Angeles county, Cal., estimated to contain eighteen and $\frac{75}{100}$ acres together with ninety-five shares of stock of the Irrigation Company of Pomona, representing $\frac{25}{100}$ of one inch of water under four-inch pressure measured from center of aperture, said stock to be delivered by party of first part and accepted by party of second part subject to the by-laws of the said Irrigation Company of Pomona, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part do covenant and agree to pay to the party of the first part, its successors or assigns, the sum of fourteen hundred dollars ($1,400), U. S. gold coin, to be paid in the following manner:

$466 on or before delivery of this contract,

$467 on or before April 9th, 1888,

$467 on or before April 9th, 1889,

59 and interest upon said respective sums from April 9th 1887 until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part, in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the

pendency of this agreement he will not commit nor suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due, then it shall be lawful for the party of the first part, its successors or assigns, at their option, to rescind this agreement to convey, to re-enter upon and repossess said premises, and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby
60 expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 25th day of April 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By CHAS. K. CLARK, *Secretary*.
H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. S. NICHOLS.

— accept this and enter into possession of the land herein described, subject to and in accordance with the conditions and provisions hereinbefore contained, and — agree to pay the amounts as therein stipulated.

H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. S. NICHOLS.

61 And the said plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of four hundred and sixty-seven dollars

($467) on or before April 9th, 1888, and the further sum of four hundred and sixty-seven dollars ($467) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein, in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of four hundred and sixty-seven dollars ($467) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of seventy-four dollars ($74), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit
62 aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of four hundred and sixty-seven dollars ($467) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of seventy-four dollars ($74), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs and assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with ninety-five shares of stock of the Irrigation Company of Pomona, representing $\frac{95}{100}$ of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract last aforesaid and by him heretofore, as aforesaid, promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay

63 to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand two hundred dollars ($1,200).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, entered into and signed another and different agreement, in writing and under seal, dated the ninth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 9th day of April, 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the city and county of San Francisco, party of the first part, and Henry M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th, A. D. 1883, and

64 in consideration of three hundred and sixty-six dollars ($366), paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of Los Angeles, State of California, to wit:

South half (S. $\frac{1}{2}$) of block 210 of the Pomona tract according to map of said tract duly recorded in Book 3, pp. 96 & 97 of miscellaneous records of Los Angeles county, Cal., estimated to contain sixteen and $\frac{49}{100}$ acres, together with seventy shares of stock of the Irrigation Company of Pomona, representing $\frac{7}{10}$ of one inch of water under four-inch pressure measured from center of aperture, said stock to be delivered by party of first part and accepted by party of second part subject to the by-laws of the said Irrigation Company of Pomona, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying

pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of eleven hundred dollars ($1,100) U. S. gold coin, to be paid in the following manner:

$366 on or before delivery of this contract,

65 $367 on or before April 9th, 1888,

$367 on or before April 9th, 1889,

$—— on or before —— —, 188–,

and interest upon said respective sums from April 9th, 1887 until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part, in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money the party of the second part hereby expressly agrees to refund all amounts so paid with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit nor suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be place- thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due, then it shall be lawful for the party of the first part, its successors or assigns, at their option, to rescind this agreement to convey, to re-enter upon and repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is

agreed that in such case that all payments theretofore made

66 shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by its president and secretary thereunto duly authorized; and the party of the sec-

ond part has hereunto set his hand and seal this 25th day of April, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By CHAS. K. CLARK, *Secretary*.
H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. S. NICHOLS.

— accept this and enter into possession of the land herein described, subject to and in accordance with the conditions and provisions hereinbefore contained, and — agree to pay the amounts as therein stipulated.

H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. S. NICHOLS.

67 And the said plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of three hundred and sixty-seven dollars ($367) on or before April 9th, 1888, and the further sum of three hundred and sixty-seven dollars on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of three hundred and sixty-seven dollars and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of fifty-eight dollars ($58), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit afore-

68 said; and also that the said defendant made default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of three hun-

dred and sixty-seven dollars ($367) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of fifty-eight dollars ($58), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with seventy (70) shares of the Irrigation Company of Pomona, representing seven-tenths ($\frac{7}{10}$) of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable
69 to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand dollars ($1,000).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, entered into and signed another and different agreement, in writing and under seal, dated the ninth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the ninth day of April, 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the city and county of San Francisco,

California, party of the first part, and H. M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th,
70 A. D. 1883, and in consideration of three hundred and sixteen dollars ($316) paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of Los Angeles, State of California, to wit:

Southeast quarter (S. E. ¼) of block 211 of the Pomona tract, according to map of said tract duly recorded in Book 3 pp. 96 & 97 of miscellaneous records of Los Angeles county, Cal., estimated to contain ten acres, together with fifty shares of stock of the Irrigation Company of Pomona, representing $\frac{5}{10}$ of one inch of water under four-inch pressure measured from center of aperture, said stock to be delivered by party of first part and accepted by party of second part subject to the by-laws of the said Irrigation Company of Pomona, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of nine hundred and
71 fifty dollars ($950), U. S. gold coin, to be paid in the following manner:

$316 on or before delivery of this contract,
$317 on or before April 9th, 1888,
$317 on or before April 9th, 1889,
$—— on or before —— —, 188–,

and interest upon said respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part, in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement on the said described premises, and in default of the party of the second part doing so, the party of the first part may — the same, and before the final payment of purchase-money the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit nor suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due, then it shall be lawful for the party of the first part, its successors or assigns, at their option, to rescind this agreement to convey, to re-enter upon and to repossess said premises, and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and
72 it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 25th day of April, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By CHAS. K. CLARK, *Secretary*.

H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. F. NICHOLS.

— accept this and enter into possession of the land herein described subject to and in accordance with the conditions and provisions hereinbefore contained, and — agree to pay the amounts as therein stipulated.

H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. S. NICHOLS.

73 And the said plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said

plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of three hundred and seventeen dollars ($317) on or before April 9th, 1888, and the further sum of three hundred and seventeen dollars ($317) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be at the option of said plaintiff added to the principal and to bear interest from the date of its maturity, at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein, in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of three hundred and seventeen dollars ($317) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of fifty dollars and seventy-two cents ($50.72), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum; of all of which the said defendant then and there had due notice, to wit, at Po-
74 mona, to wit, at Detroit aforesaid; and also that the said defendant made default, in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of three hundred and seventeen dollars ($317) and interests thereon from the said ninth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of fifty dollars and seventy-two cents ($50.72), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum; of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain and sale, to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situate in the county of Los Angeles, in the State of California, together with fifty (50) shares of stock of the Irrigation Company of Pomona, representing five-tenths ($\frac{5}{10}$) of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract; of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused, as

aforesaid, to make said payments called for in said con-
75 tract last aforesaid and by him heretofore as aforesaid promised to be made or any part thereof; by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of eight hundred dollars ($800).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, entered into and signed another and different agreement, in writing and under seal, the said defendant signing said agreement "H. M. Loud," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made this 9th day of April, 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the city and county of San Francisco,
California, party of the first part, and H. M. Loud of Oscoda,
76 Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th, A. D. 1883, and in consideration of two hundred and sixty-six dollars ($266) paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and the full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of Los Angeles, State of California, to wit:

Block 238 Pomona tract estimated to contain eight and $\frac{8}{10}$ acres, together with eighty (80) shares of stock of the Irrigation Company of Pomona, representing $\frac{8}{10}$ of one inch of water under four-inch pressure measured from center of aperture, said stock to be delivered by party of first part and accepted by party of second part subject to the by-laws of the said Irrigation Company of Pomona, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of eight hundred dollars ($800), U. S. gold coin, to be paid in the following manner:

$266 on or before delivery of this contract,
77 $267 on or before April 9th, 1888,
$267 on or before April 9th, 1889,
$— on or before —— —, 188–,

and interest upon said respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part, in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit nor suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due, then it shall be lawful for the party of the first part, its successors or assigns, at their option, to rescind this agreement to convey, to re-enter upon and repossess said premises, and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made
78 shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by its president and secretary thereunto duly authorized; and the party of the sec-

ond part has hereunto set his hand and seal this 25th day of April, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By CHAS. K. CLARK, *Secretary*.
H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. S. NICHOLS.

— accept this, and enter into possession of the land herein described, subject to and in accordance with the conditions and provisions hereinbefore contained, and — agree to pay the amounts as therein stipulated.

H. M. LOUD. [L. S.]

Sealed and delivered in the presence of—
B. S. NICHOLS.

79 And the said plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of two hundred and sixty-seven dollars ($267) on or before April 9th, 1888, and the further sum of two hundred and sixty-seven dollars ($267) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be at the option of said plaintiff added to the principal, and to bear interest from the date of its maturity at eight (8) per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of two hundred and sixty-seven dollars ($267) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sums of money or any part thereof; and the said plaintiff avers that thereu*nto*, by its option, the interest money then maturing under said contract, to wit, the sum of forty-two dollars and twenty-seven cents ($42.27), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then
80 and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of two hundred and

sixty-seven dollars ($267) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of forty-two dollars and twenty-seven cents, was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey, by deed of grant, bargain and sale, to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with eighty (80) shares of stock of the Irrigation Company of Pomona, representing eight-tenths ($\frac{8}{10}$) of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused, as aforesaid, to make said payments
81 called for in said contract last aforesaid and by him heretofore, as aforesaid, promised to be made, or any part thereof; by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, —, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when the said defendant should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of six hundred and fifty dollars ($650).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the twenty-third day of June, A. D. 1887, entered into and signed another and different agreement, in writing and under seal, dated the fifteenth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "Henry M. Loud, by T. E. McComas, his attorney-in-fact," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 15th day of April, 1887, between Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office
82 and principal place of business in the town of Pomona, county

of Los Angeles, State of California, party of the first part, and H. M. Loud of Oscoda, Michigan, party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th, A. D. 1883, and in consideration of four hundred and sixty dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of San Bernardino, State of California, to wit:

Beginning at the northwest corner of lot 34 of the San Antonio tract, thence easterly following the south line of the right of way of the S. P. R. R. 661 & $\frac{56}{100}$ feet, thence southerly and parallel with Olive avenue 770 & $\frac{25}{100}$ feet, thence westerly and parallel with Fifth avenue 660 & $\frac{75}{100}$ feet, thence northerly following the center line of Olive avenue 744 & $\frac{75}{100}$ feet to the point of beginning containing 11 & $\frac{5}{10}$ acres and being in the northwest corner of lot 34 of the San Antonio tract according to map of said tract duly recorded in Book 3, page 7 of maps — records of San Bernardino county, California, containing 11 & $\frac{5}{10}$ acres of land together with 115 shares of stock of the Palomares Irrigation Company representing 1.15 inches of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of second part, subject to the by-laws of the
83 said Palomares Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of eighteen hundred and forty dollars, U. S. gold coin, to be paid in the following manner:

$460 on or before delivery of this contract,

$690 on or before April 15th, 1888,

$690 on or before April 15th, 1889,

$— on or before —— —, 188–,

and interest upon said respective sums from April 15th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or

assessed during the pendency of this agreement, on the said described premises, and in default of the party of second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

84 And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 23rd day of June, 1887. Executed in duplicate.

85 POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD, [L. S.]
By J. E. McCOMAS, *His Att'y-in-Fact*.

Sealed and delivered in the presence of—
C. P. NICHOLS.

And the said plaintiff further avers that the said J. E. McComas was fully authorized and empowered by the said defendant, Henry M. Loud, to sign said agreement in his behalf, and that the said defendant, Henry M. Loud, knew of and authorized the signing of said contract in his name by the said J. E. McComas as his attorney-in-fact.

And said plaintiff further saith that the said defendant afterward, to wit, on the twenty-third day of June, A. D. 1887, at, to wit, Pomona

to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of six hundred and ninety dollars ($690) on or before April 15th, 1888, and the further sum of six hundred and ninety dollars ($690) on or before April 15th, 1889, together with interest on said respective sums from April 15th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be at the option of said plaintiff added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry
86 M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the fifteenth day of April, A. D. 1888, pay to the said plaintiff the sum of six hundred and ninety dollars ($690) and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of one hundred and ten dollars and forty cents ($110.40), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also the said defendant made default in this, that said defendant did not on or before the fifteenth day of April, A. D. 1889, pay to the said plaintiff the sum of six hundred and ninety dollars ($690) and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of one hundred and ten dollars and forty ($110.40), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the
87 defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred and fifteen (115) shares of stock of the Palomares Irrigation Company, representing one and fifteen one-hundredths (1.15) inches of water under four (4) inch pressure,

measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract aforesaid and by him hereinbefore, as aforesaid, promised to be made or any part thereof; by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand seven hundred dollars ($1,700).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the
88 twenty-third day of June, A. D. 1887, entered into and signed another and different agreement, in writing and under seal, dated the fifteenth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud," by J. E. McComas, his attorney-in-fact, in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made 15th day of April, 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part and H. M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th A. D. 1883, and in consideration of four hundred and seventy-two dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of San Bernardino State of California, to wit:

Beginning at the northeast corner of lot 34 of the San Antonio tract, thence southerly 795.75 ft. westerly and parallel with Fifth avenue 660.75 ft. thence northly and parallel with Olive
89 avenue 770.25 ft. to the right of way of the S. P. R. R. Co. thence easterly following the south line of said right of way 661.56 ft. to the point of beginning containing 11.8 acres and being

in the northeast corner of lot 34 of the San Antonio tract, according to map of said tract duly recorded in Book 3, page 7 of maps records of San Bernardino county, California, containing 11.8 acres of land together with 118 shares of stock of the Palomares Irrigation Company representing 1.18 inches of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Palomares Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of eighteen hundred and eighty-eight dollars, U. S. gold coin, to be paid in the following manner:

$472 on or before delivery of this contract,
$708 on or before April 15th, 1888,
$708 on or before April 15th, 1889,
$— on or before —— —, 188–,

and interest upon said respective sums from April 15th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be
90 added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated

damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

91

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the part- of the second part ha- hereunto set his hand and seal this 23rd day of June, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD, [L. S.]
By J. E. McCOMAS, *His Att'y-in-fact*.

Sealed and delivered in the presence of—
C. P. NICHOLS.

And the said plaintiff further avers that the said J. E. McComas was fully authorized and empowered by the said defendant, Henry M. Loud, to sign said agreement in his behalf, and that the said defendant, Henry M. Loud, knew of and authorized the signing of said contract in his name by the said J. E. McComas as his attorney-in-fact.

And the said plaintiff further saith that the said defendant afterward, to wit, on the twenty-third day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned contract, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of seven hundred and eight dollars ($708) on or before April 15th, 1888, and the further sum of seven hundred and eight dollars ($708) on or before April 15th, 1889, together with interest on said respective sums from April 15th, 1887, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums if not paid to be at the option of said plaintiff added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the fifteenth day of April, A. D. 1888, pay to the said plaintiff the sum of seven hundred and eight dollars ($708) and

92

interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of one hundred and thirteen dollars and twenty-eight cents ($113.28), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the fifteenth day of April, A. D. 1889, pay to the said plaintiff the sum of seven hundred and eight dollars ($708) and interest
93 thereon from the said fifteenth dayof April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of one hundred and thirteen dollars and twenty-eight cents ($113.28), was added to the principal, and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred and eighteen (118) shares of stock of the Palomares Irrigation Company, representing *land* $\frac{1}{100}$ inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract aforesaid and by him heretofore as aforesaid promised to be made or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable,
94 he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand seven hundred dollars ($1,700).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the twenty-third day of June, A. D. 1887, entered into and signed another and different agreement, in writing and under seal, dated the fifteenth day of April, A. D. 1887, with the said plaintiff, the defendant signing said agreement "H. M. Loud," by J. E. McComas, his attorney-in-fact, in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 15th day of April, A. D. 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and H. M. Loud of Oscoda, Michigan, party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th, A. D. 1883, and in consideration of four hundred dollars,
95 paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and the full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following described real property, situated in the county of San Bernardino, State of California, to wit:

Beginning at the southeast corner of lot 34, of the San Antonio tract, thence westerly following the center line of Fifth avenue 660.75 feet, thence northerly and parallel with Olive avenue 659.25 feet, thence easterly and parallel with Fifth avenue 660.75 feet, thence southerly 659.25 feet to the point of beginning. Containing ten (10) acres and being in the southeast corner of lot 34 of the San Antonio tract according to map of said tract duly recorded in Book 3 page 7 of maps records of San Bernardino county, California, containing ten (10) acres of land together with 100 shares of stock of the Palomares Irrigation Company representing one inch of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Palomares Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts and to inspect, repair, replace, and control the same.

96 And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the

party of the first part, its successors or assigns, the sum of sixteen hundred dollars, U. S. gold coin, to be paid in the following manner:

$400 on or before delivery of this contract,
$600 on or before April 15th, 1888,
$600 on or before April 15th, 1889,
$— on or before —— —, 188–,

and interest upon said respective sums from April 15th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be
97 made in any of the above payments for space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation by the party of the second part.

And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by its president and secretary thereunto duly authorized; and the party of

the second part has hereunto set his hand and seal this 23rd day of June, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD, [L. S.]
By J. E. McCOMAS, *His Attorney-in-fact*.

Sealed and delivered in the presence of—
C. P. NICHOLS.

98 And the said plaintiff further avers that the said J. E. McComas was fully authorized and empowered by the said defendant, Henry M. Loud, to sign said agreement in his behalf, and that the said defendant, Henry M. Loud, knew of and authorized the signing of said contract in his name by the said J. E. McComas as his attorney-in-fact.

And the said plaintiff further saith that the said defendant afterward, to wit, on the twenty-third day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of six hundred dollars ($600) on or before April 15th, 1888, and the further sum of six hundred *of six hundred* dollars ($600) on or before April 15th, 1889, together with interest on said respective sums from April 15th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight (8) per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the fifteenth day of April, A. D. 1888, pay to the said plaintiff the sum of six hundred dollars ($600) and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable
99 annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of ninety-six dollars ($96), was added to the principal and bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the fifteenth day of April, A. D. 1889, pay to the said plaintiff the sum of six hundred dollars ($600) and the

interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of ninety-six dollars (896), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred three (100) shares of stock of the Palomares Irrigation Company, representing one inch (1) of water under four (4) inch pressure, measured from center of aperture, in accordance with the
100 terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made or any part thereof; by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand four hundred and fifty dollars ($1,450).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the twenty-third day of June A. D. 1887, entered into and signed another and different agreement, in writing and under seal, dated the fifteenth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud, his attorney-in-fact," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 15th day of April 1887, between the Pomona Land and Water Company, a corporation duly organ-
101 ized under the laws of the State of California, and having its office and principal place of business in the town of Pomona,

county of Los Angeles, State of California, party of the first part, and H. M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th A. D. 1883, and in consideration of four hundred dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the part- of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, h- heirs or assigns, the following-described real property, situated in the county of San Bernardino State of California, to wit:

Beginning at the southeast corner of lot 34 of the San Antonio tract, thence easterly following the center line of Fifth avenue 660.75 feet, thence northerly and parallel with Olive avenue 659.25 feet, thence westerly and parallel with Fifth avenue 660.75 feet, thence southerly following the center line of Olive avenue 659.25 feet to the point of beginning. Containing ten (10) acres and being in the southwest corner of lot 34 of the San Antonio tract according to map of said tract duly recorded in Book 3 page 7 of maps records of San Bernardino county, California, containing ten (10) acres of land together with 100 shares of stock of the Palomares Irrigation Company, representing one inch of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Palomares Irrigation Company,

when payment in full is made for the above-described
102 land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of sixteen hundred dollars, U. S. gold coin, to be paid in the following manner:

$400 on or before delivery of this contract,
$600 on or before April 15th, 1888,
$600 on or before April 15th, 1889,
$— on or before —— —, 188–,

and interest upon said respective sums from April 15th, 1887, until paid, at the rate of eight per cent. per annum, payable annually: and if not so paid, at option of said company to be added to the principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during

the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of the purchase-money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

103 And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their — to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 23rd day of June, 1887. Executed in duplicate.

104 POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.

H. M. LOUD, [L. S.]
By J. E. McCOMAS, *His Att'y-in-fact*.

Sealed and delivered in the presence of—
C. P. NICHOLS.

And the said plaintiff further avers that the said J. E. McComas was fully authorized and empowered by the said defendant, Henry M. Loud, to sign said agreement in his behalf, and that the said defendant, Henry M. Loud, knew of and authorized the signing of *said* contract in his name by the said J. E. McComas as his attorney-in-fact.

And the said plaintiff further saith that the said defendant afterward, to wit, on the twenty-third day of June, A. D. 1887, at, to wit

Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of $600 on or before April 15th, 1888, and the further sum of $600 on or before April 15th, 1889, together with interest on said respective sums from April 15th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight (8) per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary
105 thereof, made default therein in this, that the said defendant did not on or before the fifteenth day of April, A. D. 1888, pay to the said plaintiff the sum of $600 and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the sum of money or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of $96, was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not, on or before the fifteenth day of April, A. D. 1889, pay to the said plaintiff the sum of $600 and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of $96, was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county
106 of San Bernardino, in the State of California, together with 100 shares of stock of the Palomares Irrigation Company, representing one (1) inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant had negligently refused as aforesaid to make said payments called for in said contract aforesaid

and by him heretofore as aforesaid promised to be made or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said last-mentioned contract and hereinbefore specified when the said defendant should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of $1,450.

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the sixteenth day of June, A. D. 1887, entered into and signed another and different agreement, in writing and under seal, dated the fifteenth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud, by J. E. McComas, his att'y-in-fact," in the following words and figures, to wit:

107 Office of the Pomona Land and Water Company.

This agreement made the 15th day of April, 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and H. M. Loud of Oscoda, Michigan, party of the second part, witnesseth, that in pursuance of a resolution of its board of directors adopted October 25th 1883, and in consideration of two hundred and seventy-five dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of San Barnardino, State of California, to wit, northeast quarter (N. E. ¼) of lot 43 of the San Antonio tract according to map of said tract duly recorded in Book 3, page 7 of maps records of San Bernardino county, California, estimated to contain ten and $\frac{25}{100}$ acres of land together with 100.25 shares of stock of the Palomares Irrigation Company representing (1.0025) inches of water under four-inch pressure measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Palomares Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right

to enter upon said lands and make necessary excavations for
108 laying pipes and aqueducts and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of eleven hundred and two and $\frac{75}{100}$ dollars, U. S. gold coin, to be paid in the following manner:

$275 on or before delivery of this contract,

$413.75 on or before April 15th, 1888,

$414 on or before April 15th, 1889,

$— on or before —— —, 188–,

and interest upon said respective sums from April 15th 1887 until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to the principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now exist-
109 ing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president

and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 16th day of June 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.

110 H. M. LOUD, [L. S.]
By J. E. McCOMAS, *His Att'y-in-fact*.

Sealed and delivered in the presence of—
C. P. NICHOLS.

And the said plaintiff further avers that the said J. E. McComas was fully authorized and empowered by the said defendant, Henry M. Loud, to sign said agreement in his behalf, and that the said defendant, Henry M. Loud, knew of and authorized the signing of said contract in his name by the said J. E. McComas as his attorney-in-fact.

And the said plaintiff further saith that the said defendant afterward, to wit, on the sixteenth day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of four hundred and thirteen dollars and seventy-five cents ($413.75) on or before April 15th, 1888, and the further sum of four hundred and fourteen dollars ($414) on or before April 15th, 1889, together with interest on said respective sums from April 15th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight (8) per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the fifteenth day of

111 April, A. D. 1888, pay to the said plaintiff the sum of four hundred and thirteen dollars and seventy-five cents ($413.75) and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight per cent. (8) per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest then maturing under said contract, to wit, the sum of sixty-six dollars and twenty-four cents ($66.24), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the fifteenth day of April, A. D. 1889, pay to the said

plaintiff the sum of four hundred and fourteen dollars ($414) and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six dollars and twenty-four cents ($66.24), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said

112 Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred and twenty-five one-hundredths (100 and $\frac{25}{100}$) shares of stock of the Palomares Irrigation Company, representing 1 and $\frac{25}{10000}$ inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract last aforesaid and by him heretofore, as aforesaid, promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand one hundred dollars ($1,100).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the sixteenth day of June, A. D. 1887, entered into and signed another and dif-

113 ferent agreement, in writing and under seal, with the said plaintiff, the said defendant signing said agreement "H. M. Loud, by J. E. McComas, his att'y-in-fact," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 15th day of April 1887, between the Pomona Land and Water Company, a corporation duly organized

under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and H. M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th A. D. 1883, and in consideration of two hundred and seventy-five dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of San Bernardino State of California, to wit:

Northwest quarter (N. W. $\frac{1}{4}$) of lot 43 of the San Antonio tract, according to map of said tract duly recorded in Book 3 page 7 of maps records of San Bernardino county, California, estimated to contain ten and $\frac{25}{1000}$ acres of land together with 100.25 shares of stock of the Palomares Irrigation Company representing 1.0025 inches of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first
114 part and accepted by said party of second part subject to the by-laws of the said Palomares Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of eleven hundred and two and $\frac{75}{100}$ dollars, U. S. gold coin, to be paid in the following manner:

$275 on or befo-e delivery of this contract,

413.75 on or before April 15th, 1888,

$414 on or before April 15th, 1889,

$—— on or before —— —, 188–,

and interest upon said respective sums from April 15th 1887 until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the

party of the first part may pay the same, and before the final
115 payment of purchase-money the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement — will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the party of the
116 second part has hereunto set his hand and seal this 16th day of June 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD, [L. S.]
By J. E. McCOMAS, *His Att'y-in-fact*.

Sealed and delivered in the presence of—
C. P. NICHOLS.

And the said plaintiff further avers that the said J. E. McComas was fully authorized and empowered by the said defendant, Henry M. Loud, to sign said agreement in his behalf, and that said defendant, Henry M. Loud, knew of and authorized the signing of said contract in his name by the said J. E. McComas, as his attorney-in-fact.

And the said plaintiff further saith that the said defendant afterward, to wit, on the sixteenth day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and

State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of four hundred and thirteen dollars and seventy-five cents ($413.75) on or before April 15th, 1888, and the further sum of four hundred and fourteen dollars ($414) on or before April 15th, 1889, together with interest on said respective sums from April 15th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal, and to bear interest from the date of its maturity at eight %
117 per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the fifteenth day of April, A. D. 1888, pay to the said plaintiff the sum of four hundred and thirteen dollars and seventy-five cents ($413.75) and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six dollars and twenty-four cents ($66.24), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant did not on or before the fifteenth day of April, A. D. 1889, paid to the said plaintiff the sum of four hundred and fourteen dollars ($414) and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six dollars and twenty-four cents ($66.24), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at
118 times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred and twenty-five one-hundredths (100 and $\frac{25}{100}$) shares of stock of the Palomares Irrigation Company, representing 1 and $\frac{25}{10000}$ inches of water under four-inch pressure, measured from center of aperture, in accordance with the terms of said con-

tract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand one hundred dollars ($1,100).

119 And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the sixteenth day of June, A. D. 1887, entered into and signed another and different agreement, in writing and under seal, dated the fifteenth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud, by J. E. McComas, his attorney-in-fact," in the following words and figures, to wit:

Office of Pomona Land and Water Company.

This agreement made the 15th day of April 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and H. M. Loud, of Oscoda, Michigan, party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th 1883, and in consideration of two hundred and seventy-five dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of San Bernardino, State of California, to wit:

Southeast quarter (S. E. ¼) of lot 43 of the San Antonio tract according to map of said tract duly recorded in Book 3 page
120 7 of maps records of San Bernardino county, California, estimated to contain ten and $\frac{25}{100}$ acres of land together with 100.25 shares of stock of the Palomares Irrigation Company representing 1.0025 inches of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of second part, subject to

the by-laws of the said Palomares Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of eleven hundred and two and $\frac{75}{100}$ dollars, U. S. gold coin, to be paid in the following manner:

$275 on or before delivery of this contract,

$413.75 on or before April 15th, 1888,

$414 on or before April 15th, 1889,

$— on or before —— —, 188–,

and interest upon said respective sums from April 15th 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part, in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

121

And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the

party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

122 In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 16th day of June, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD, [L. S.]
By J. E. McCOMAS, *His Att'y-in-fact*. [L. S.]

Sealed and delivered in the presence of—
C. P. NICHOLS.

And the said plaintiff further avers that the said J. E. McComas was fully authorized and empowered by the said defendant, Henry M. Loud, to sign said agreement in his behalf, and that the said defendant, Henry M. Loud, knew of and authorized the signing of said contract in his name by the said J. E. McComas as his attorney-in-fact.

And the said plaintiff further saith that the said defendant afterward, to wit, on the sixteenth day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of four hundred and thirteen dollars and seventy-five cents ($413.75) on or before April 15th, 1888, and the further sum of four hundred and fourteen dollars ($414) on or

123 before April 15th, 1889, together with interest on said respective sums from April 15th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default in this, that the said defendant did not on or before the fifteenth day of April, A. D. 1888, pay to the said plaintiff the sum of four hundred and thirteen dollars and seventy-five cents ($413.75) and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under

said contract, to wit, the sum of sixty-six dollars and twenty-four cents ($66.24), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant did not, on or before the fifteenth day of April, A. D. 1889, pay to the said plaintiff the sum of four hundred and fourteen dollars ($414) and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six dollars and twenty-four cents, was added to the prin-
124 cipal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred and twenty-five hundredths (100 and $\frac{25}{100}$) shares of stock of the Palomares Irrigation Company, representing 1 and $\frac{25}{10000}$ inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which the said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein
125 last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand and one hundred dollars ($1,100).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the sixteenth day of June, A. D. 1887, entered into and signed another and different agreement in writing and under seal, dated the fifteenth day of April, A. D. 1887, with the said plaintiff, the said defendant signing

said agreement "H. M. Loud, by J. E. McComas, his attorney-in-fact," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 15th day of April 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and H. M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th, A. D. 1883, and in consideration of two hundred and seventy-five dollars paid by the party of the second —, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of
126 grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of San Bernardino State of California, to wit:

Southwest quarter (S. W. $\frac{1}{4}$) of lot 43 of the San Antonio tract according to map of said tract duly recorded in Book 3 page 7 of maps records of San Bernardino county, California estimated to contain ten and $\frac{25}{100}$ acres of land together with 100.25 shares of stock of the Palomares Irrigation Company representing 1.0025 inches of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of second part, subject to the by-laws of the said Palomares Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of eleven hundred and two and $\frac{75}{100}$ dollars, U. S. gold coin, to be paid in the following manner:

$275 on or before delivery of this contract,
$413.75 on or before April 15th, 1888,
$414 on or before April 15th, 1889,
$—— on or before ——, 188–,

and interest upon said respective sums from April 15th, 1887, until paid, at the rate of eight per cent. per annum payable annu-
127 ally; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part

may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed
128 of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 16th day of June, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD, [L. S.]
By J. E. McCOMAS, *His Att'y-in-fact*.

Sealed and delivered in the presence of—
C. P. NICHOLS.

And the said plaintiff further avers that the said J. E. McComas was fully authorized and empowered by the said defendant, Henry M. Loud, to sign said agreement in his behalf, and that the said defendant, Henry M. Loud, knew of and authorized the signing of said

contract in his name by the said J. E. McComas, as his attorney-in-fact.

And the said plaintiff further saith that the said defendant afterward, to wit, on the sixteenth day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plain-
129 tiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of four hundred and thirteen dollars and seventy-five cents ($413.75) on or before April 15th, 1888, and the further sum of four hundred and fourteen dollars ($414) on or before April 15th, 1889, together with interest on said respective sums from April 15th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal, and to bear interest from the date of its maturity at eight (8) per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the fifteenth day of April, A. D. 1888, pay to the said plaintiff the sum of four hundred and thirteen dollars and seventy-five cents ($413.75), and interest thereon from the said fifteenth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six dollars and twenty-four cents ($66.24), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the fifteenth day of April, A. D. 1889, pay to the said plaintiff the sum of four hundred and fourteen dollars ($414) and interest thereon from the said fifteenth day of April, A. D.
130 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six dollars and twenty-four cents ($66.24), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey, by deed of grant, bargain, and sale, to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San

Bernardino, in the State of California, together with one hundred and twenty-five one-hundredths (100.25) shares of stock of the Palomares Irrigation Company, representing 1 and $\frac{25}{100}$ inches of water under (4-) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto after-
131 ward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand dollars ($1,000).

And for that whereas also the said defendant, Henry M. Loud, for a valuable consideration, heretofore, to wit, on the fifteenth day of June, A. D. 1887, entered into and signed another and different agreement in writing and under seal, dated the fifteenth day of April, A. D. 1887, with the said plaintiff, the said defendant signing said agreement "H. M. Loud, by J. E. McComas, his attorney-in-fact," in the following words and figures, to wit:

Office of the Pomona Land and Water Company.

This agreement made the 25th day of April 1887, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part and H. M. Loud of Oscoda, Michigan party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th A. D. 1883, and in consideration of five hundred and fifty dollars, paid by the party of the second part, the party of the
132 first part does covenant and agree that after the making of the payments and the full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the party of the second part, his heirs or assigns, the following-described real property, situated in the county of San Bernardino State of California, to wit:

Most easterly twenty (20) acres of lot 36 of the San Antonio tract according to map of said tract duly recorded in Book 3 page 7 of maps records of San Bernardino county, California, estimated to contain twenty (20) acres of land together with 200 shares of stock

of the Palomares Irrigation Company representing two inches of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Palomares Irrigation Company, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, ans as the purchase price of the above-described premises, the party of the second part does covenant and agree to pay to the party of the first part, its successors or assigns, the sum of twenty-two hundred dollars U. S. gold coin, to be paid in the following manner:

133 $550 on or before delivery of this contract,
$825 on or before April 25th, 1888,
$825 on or before April 25th, 1889,
$— on or before —— —, 188–,

and interest upon said respective sums from April 25th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money, the part- of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is

134 agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a

conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 16th day of June 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,

[Seal of the said Company.]

By F. L. PALMER, *Secretary*.
H. M. LOUD, [L. S.]
By J. E. McCOMAS, *His Att'y-in-fact*.

Sealed and delivered in the presence of—
C. P. NICHOLS.

And the said plaintiff further avers that the said J. E. McComas was fully authorized and empowered by the said defendant, Henry M. Loud, to sign said agreement in his behalf, and that the said defendant, Henry M. Loud, knew of and authorized the signing of said contract in his name by the said J. E. McComas as his attorney-in-fact.

135 And the said plaintiff further saith that the said defendant afterward, to wit, on the sixteenth day of June, 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of eight hundred and twenty-five dollars ($825) on or before the twenty-fifth day of April, A. D. 1888, and the further sum of eight hundred and twenty-five dollars ($825) on or before April 25th, A. D. 1889, together with interest on said respective sums from April 25th, 1887, until paid at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum; and the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before April 25th, A. D. 1888, pay to the said plaintiff the sum of eight hundred and twenty-five dollars ($825) and interest thereon from the twenty-fifth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said

plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of one hundred and thirty-two dollars ($132), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due
136 notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the twenty-fifth day of April, A. D. 1889, pay to the said plaintiff the sum of eight hundred and twenty-five dollars ($825) and interest thereon from the twenty-fifth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by his option, the interest money then maturing under said contract, to wit, the sum of one hundred and thirty-two dollars ($132), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey, by deed of grant, bargain, and sale, to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with two hundred (200) shares of stock of the Pelomares Irrigation Company, representing two (2) inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last afore-
137 said and by him heretofore as aforesaid promised to be made or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of two thousand one hundred dollars ($2,100).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the 3rd day of May, A. D. 1887, for a valuable

consideration, entered into and signed a certain other and different agreement with the said plaintiff in writing and under seal, dated the eighth day of April, 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of the said plaintiff in said written agreement hereinbefore last mentioned contained, — that it would, in consideration of the sum of twenty-five hundred and thirty-nine dollars ($2,539) paid by said defendant and after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey, by deed of grant, bargain, and sale, to the said defendant, his heirs or assigns, certain real property situated in the county of Los
138 Angeles, State of California, and particularly described in said last-mentioned agreement, estimated to contain forty and $\frac{62}{100}$ acres of land, together with 406 and $\frac{2}{10}$ shares of stock of the Del Monte Irrigation Company, representing four inches and sixty-two one-thousandths of an inch of water under four-inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Del Monte Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of the said last-mentioned premises, the sum of ten thousand one hundred and fifty-five dollars ($10,155) in United States gold coin, to be — as follows:

$2,539 on or before delivery of said contract; $3,808 on or before April 8th, 1888; $3,808 on or before April 8th, 1889, together with interest on said respective sums from April 8th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, and if not so paid, then said interest, at option of said company, to be added to the principal and to bear like interest; and the said plaintiff further saith that the said defendant afterward, to wit, on the 3rd day of May, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of $3,808 on or before April 8th, 1888, and the further sum of $3,808 on or before April 8th, 1889, together with interest on said respective sums from
139 April 8th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the eight- day of April, A. D. 1888, pay to the said plaintiff the sum of

three thousand eight hundred and eight dollars ($3,808) and interest thereon from the said eight- day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of six hundred and nine dollars and twenty-eight cents ($609.28), was added to the principal and thereafter bore like interest, at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the eight- day — April, A. D. 1889, pay to the said plaintiff the sum of three thousand eight hundred and eight dollars ($3,808) and interest thereon from the said eighth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option,

the interest money then maturing under said contract, to
140 wit, the sum of six hundred and nine dollars and twenty-eight cents ($609.28), was added to the principal and thereafter bore like interest at 8 per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with four hundred and six and two-tenths (406 & $\frac{2}{10}$) shares of stock of the Del Monte Irrigation Company, representing 4 & $\frac{62}{100}$ inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made or any part thereof; by means whereof said defendant then and there became liable to pay to the said complainant the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August,

1889, at, to wit, Detroit aforesaid, undertook and then and
141 there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large

sum of money, to wit, in the sum of nine thousand five hundred dollars ($9,500).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the 13th day of March, A. D. 1887, wherein and whereby the said —, plaintiff in said written agreement hereinbefore last mentioned contained, that it would, in consideration of the sum of one hundred and eighty-eight dollars ($188) theretofore paid to it by said defendant, after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of Los Angeles, State of California, and particularly described in said last agreement, estimated to contain eight and $\frac{76}{100}$ acres of land, together with 65 shares of stock of the Irrigation Company of Pomona, representing $\frac{65}{100}$ of one inch of water under four-inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Irrigation Company of Pomona), when payment in
142 full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of seven hundred and fifty dollars ($750) in United States gold coin, to be paid as follows:

$188 on or before delivery of said contract; $281 on or before March 30th, 1888; $281 on or before March 30th, 1889, together with interest on said respective sums from March 30th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterwards, to wit, on the twenty-fifth day of April, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, Detroit aforesaid, in United States gold coin, the sum of $281 on or before March 30th, 1888, and the further sum of $281 on or before March 30th, 1889, together with interest on said respective sums from March 30th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default

therein in this, that the said defendant did not, on or before the thirtieth day of March, A. D. 1888, pay to the said plaintiff
143 the sum of two hundred and eighty-one dollars ($281) and interest thereon from the said 30th day of March, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon by its option the interest money then maturing under said contract, to wit, the sum of $44.96, was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not, on or before the 30th day of March, A. D. 1889, pay to the said plaintiff the sum of two hundred and eighty-one dollars ($281) and interest thereon from the said 30th day of March, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon by its option the interest-money then maturing under said contract, to wit, the sum of forty-four dollars and ninety-six cents ($44.96), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of
144 Los Angeles, in the State of California, together with sixty-five (65) shares of stock of the Irrigation Company of Pomona, representing $\frac{6.5}{100}$ of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract last aforesaid and by him heretofore, as aforesaid, promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and

refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of seven hundred dollars ($700).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the third day of May, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the ninth day of April, 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said
145 plaintiff in said written agreement hereinbefore last contained, that it would, in consideration of the sum of two thousand three hundred and seventy-eight dollars and seventy-five cents ($2,378.75) theretofore paid to it, the said defendant, and after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of Los Angeles, State of California, and particularly described in said last-mentioned agreement, estimated to contain forty-two and twenty-seven one-hundredths acres of land, together with 422 & $\frac{7}{10}$ shares of stock of the Del Monte Irrigation Company, representing four inches and $\frac{227}{1000}$ of an inch of water under four inch (4) pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Del Monte Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of nine thousand five hundred and ten dollars and seventy-five cents ($9,510.75) in United States gold coin, to be paid as follows:

Two thousand three hundred and seventy-eight dollars and seventy-five cents ($2,378.75) on or before delivery of said contract; three thousand five hundred and sixty-six dollars ($3,566) on or before April 8th, 1888; three thousand five hundred and sixty-six dollars on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate
146 of eight (8) per cent. per annum, payable annually, and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterward, to wit, on the third day of May, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of three thousand five hundred and sixty-six dollars ($3,566) on or before April 9th, 1888, and the further sum of three thousand five hundred and sixty-six dollars ($3,566) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, the

said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein, in this, that the said defendant did not on or before the 9th day of April, A. D. 1888, pay to the said plaintiff the sum of three thousand five hundred and sixty-six dollars ($3,566) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon by its — the in-
147 terest money then maturing under said contract, to wit, the sum of five hundred and seventy dollars and fifty-six —, was added to the principal and thereafter bore like interest at eight (8) per cent. per annum; of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default, in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of $3,566 and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of $570.56, was added to the principal and thereafter bore like interest at eight (8) per cent. per annum; of all of which the said defendant then and there had due notice, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, estimated to contain forty-two and $\frac{27}{100}$ acres of land, together with 422 and $\frac{7}{10}$ shares of stock of the Del Monte Irrigation Company, representing four and $\frac{227}{1000}$ inches of water under four (4) inch pressure, measured
148 from center of aperture, in accordance with the terms of said contract; of all *and* of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made or any part thereof: by means whereof said defendant then and there became liable to pay to the said complainant the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant,

in consideration thereof, afterward, to wit, on the nineteenth day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of eight thousand five hundred dollars ($8,500).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the 3rd day of May, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with the said plaintiff, in writing and under seal, dated the 9th day of April, A. D. 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement thereinbefore last mentioned contained that it would, in consideration of the sum of two thousand two hundred and seventy-eight dollars and fifty cents
149 ($2,278.50) theretofore paid to it by said defendant and after the making of the payments and full performance of the covenants hereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of Los Angeles, State of California, and particularly described in said last-mentioned agreement, estimated to contain forty and $\frac{50}{100}$ acres of land, together with 405 shares of stock of the Del Monte Irrigation Company, representing four and $\frac{5}{100}$ inches of water under four-inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Del Monte Irrigation Company), when payment in full was made for the said property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of the said mentioned premises, the sum of nine thousand one hundred and twelve dollars and fifty cents in United States gold coin, to be paid as follows: $2,278.50 on or before delivery of this contract, $3,417 on or before April 9th, 1888, $3,417 on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and bear like interest; and the said plaintiff further saith that the said defendant afterward, to wit, on the 3rd day of May, A. D. 1887, at, to wit, Pomona, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the
150 said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, Detroit aforesaid, in United States gold coin, the sum of $3,417 on or before April 9th, A. D. 1888, and the further sum of $3,417 on or before April 9th, 1889, together with the interest on said

respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the 9th day of April, A. D. 1888, pay to the said plaintiff the sum of three thousand four hundred and seventeen dollars ($3,417) and interest thereon from the said 9th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of five hundred and forty-six dollars and seventy-two cents ($546.72), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the 9th day of April, 1889, pay to the said plaintiff the sum of three thousand four hundred and seventeen dollars
151 ($3,417) and interest thereon from the said 9th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof.

And the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of five hundred and forty-six dollars and seventy-two cents ($546.72), was added to the principal and thereafter bore like interest at 8 per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey, by deed of grant, bargain and sale, to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with 405 shares of stock of the Del Monte Irrigation Company, representing four and $\frac{5}{100}$ inches of water under four-inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract last aforesaid and by him heretofore, as aforesaid, promised to be made, or any part thereof; by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbe-

fore specified when he, the said defendant, should be there-
152 unto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when the said defendant should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of eight thousand five hundred dollars ($8,500).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the 3rd day of May, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the 9th day of April, A. D. 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of seventeen hundred and six dollars ($1,706) theretofore paid to it by the said defendant and after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of Los Angeles, State of California, and particularly described in said last-mentioned agreement, estimated to contain thirty and $\frac{32}{100}$ acres of land, together with 303 and $\frac{2}{10}$ shares of stock of the Del Monte Irrigation Company, representing three and $\frac{32}{100}$ inches of water under four-
inch pressure, measured from center of aperture (which said
153 stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the Del Monte Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of six thousand and eight hundred and twenty-two dollars ($6,822) in United States gold coin, to be paid as follows:

$1,706 on or before delivery of said contract, $2,558 on or before April 9th, 1888, $2,558 on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest.

And said plaintiff further saith that the said defendant afterward, to wit, on the 3rd day of May, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff aforesaid to pay it, the said plaintiff, at, to wit, Pomona, to wit, Detroit aforesaid, in United States gold coin, the

sum of $2,558 on or before April 9th, 1888, and the further sum of $2,558 on or before April 9th, 1889, together with interest on said respective sums from April 9th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

154 And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the 9th day of April, A. D. 1888, pay to the said plaintiff the sum of two thousand five hundred and fifty-eight dollars ($2,558) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of four hundred and nine dollars and twenty-eight cents ($409.28), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the 9th day of April, A. D. 1889, pay to the said plaintiff the sum of two thousand five hundred and fifty-eight dollars ($2,558) and interest thereon from the said 9th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of four hundred and nine dollars and twenty-eight cents ($409.28), was added to the principal and thereafter bore like interest at eight per cent. per annum, of all of which the said defendant then

155 and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles and State of California, together with three hundred and three and $\frac{2}{10}$ shares of stock of the Del Monte Irrigation Company, representing three and $\frac{32}{100}$ inches of water under four-inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract last aforesaid and by him heretofore, as aforesaid, promised to be made or any part thereof;

by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although often requested, has neglected and refused so to do,
156 to the plaintiff's damage in a large sum of money, to wit, in the sum of six thousand five hundred dollars ($6,500).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the third day of May, 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff in writing and under seal, dated the ninth day of April, 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of one thousand five hundred and thirty-six dollars and fifty cents ($1,536.50) paid to it, the said defendant, after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of Los Angeles, State of California, and pa-ticularly described in said last-mentioned agreement, estimated to contain twenty-seven and $\frac{30}{100}$ acres of land, together with 273 shares of stock of the Del Monte Irrigation Company, representing 2 and $\frac{73}{100}$ inches of water under four (4) inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Del Monte Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum six thousand one hundred and forty-two dollars and fifty cents ($6,142.50) in United States gold coin,
157 to be paid as follows:

One thousand five hundred and thirty-six dollars and fifty cents ($1,536.50) on or before delivery of this contract, two thousand three hundred and three dollars ($2,303.00) on or before April 9th, 1888, two thousand three hundred and three dollars ($2,303.00) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid at the rate of eight (8) per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and the said plaintiff further saith that the said defendant afterward, to wit, on the third day of May, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and

district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of two thousand three hundred and three dollars ($2,303.00) on or before April 9th, 1888, and the further sum of $2,303.00 on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in
158 this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of two thousand three hundred and three dollars ($2,303.00) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of three hundred and sixty-eight dollars and forty-eight cents, was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not — or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of two thousand three hundred and three dollars ($2,303.00) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of three hundred and sixty-eight dollars and forty-eight cents ($368.48), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the
159 said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with two hundred and seventy-three (273) shares of stock of the Del Monte Irrigation Company, representing two (2) and $\frac{73}{100}$ inches of water under four (4) inch pressure, measured from center of aperture, in accordance with

the terms of said contract, of all of which the said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said complainant the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested so to do, has neglected and refused, to the plaintiff's damage in a large sum of money, to wit, in the sum of six thousand dollars ($6,000).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the 9th day — April, 1887,
160 wherein and whereby the said defendant, in consideration of the promise — agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of four hundred dollars ($400) paid to it, the said defendant, after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of Los Angeles, State of California, and particularly described in the said last-mentioned agreement, estimated to contain twenty-two (22) and $\frac{8}{100}$ acres of land, together with 68 shares of stock of the Irrigation Company of Pomona, representing $\frac{68}{100}$ of one inch of water under four (4) inch pressure, measured from center of aperture, which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Irrigation Company of Pomona, when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of the said last-mentioned premises, the sum of twelve hundred dollars ($1,200) in United States gold coin, to be paid as follows:

Four hundred dollars ($400) on or before delivery of this contract, four hundred dollars ($400) on or before April 9th, 1888, four hundred dollars ($400) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid at the rate of eight (8) per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to
161 be added to the principal and to bear like interest; and said

plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of four hundred dollars ($400) on or before April 9th, 1888, and the further sum of four hundred dollars ($400) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight (8) per cent. per annum.

And the said plaintiff further says that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of four hundred dollars ($400) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-four dollars ($64), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of four hundred dollars ($400) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-four dollars ($64), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

162

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with sixty-eight (68) shares of stock of the Irrigation Company of Pomona, representing $\frac{68}{100}$ of one inch of water under four (4) inch pressure, measured

from center of aperture, in accordance with the terms of said contract, of all of which the said defendant then and there had notice, to wit, at Pomona, to wit, at Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract aforesaid and by him heretofore
163 as aforesaid promised to be made or any part thereof; by means whereof said defendant then and there became liable to pay to the said complainant the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand dollars ($1,000).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the ninth day of April, 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of four hundred and sixty-six dollars ($466) paid to it, the said defendant, after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of Los Angeles, State of Cali-
164 fornia, and particularly described in said last-mentioned agreement, estimated to contain 18 and $\frac{92}{100}$ acres of land, together with 95 shares of stock of the Irrigation Company of Pomona, representing $\frac{95}{100}$ of one inch of water under four (4) inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Irrigation Company of Pomona), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of fourteen hundred dollars ($1,400) in United States gold coin, to be paid as follows:

Four hundred and sixty-six dollars ($466) on or before delivery of said contract, four hundred and sixty-seven dollars ($467) on or before April 9th, 1888, four hundred and sixty-seven dollars ($467) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually; and if not paid, then said

interest, at the option of said company, to be added to the principal and to bear like interest; and the said plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, Detroit aforesaid, in United States gold coin, the sum of four
165 hundred and sixty-seven dollars ($467) on or before April 9th, 1888, and the further sum of four hundred and sixty-seven dollars ($467) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight (8) per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of four hundred and sixty-seven dollars ($467) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of seventy-four dollars ($74), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of four hundred and sixty-seven dollars ($467) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not
166 hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of seventy-four ($74) dollars, was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the

property described in said contract and situated in the county of Los Angeles, in the State of California, together with ninety-five (95) shares of stock of the Irrigation Company of Pomona, representing $\frac{95}{100}$ of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which the said defendant then and there had notice, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said complainant the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the
167 nineteenth day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand two hundred dollars ($1,200).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the ninth day of April, 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of three hundred and sixty-six dollars ($366) paid to it, the said defendant, after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of Los Angeles, State of California, and particularly described in said last-mentioned agreement, estimated to contain sixteen (16) $\frac{49}{100}$ acres of land, together with 70 shares of stock of the Irrigation Company of Pomona, representing $\frac{7}{10}$ of one inch of water under four (4) inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted
168 by the defendant subject to the by-laws of the said Irrigation Company of Pomona), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of one thousand one hundred dollars ($1,100) in United States gold coin, as follows:

Three hundred and sixty-six dollars ($366) on or before delivery of said contract, three hundred and sixty-seven dollars ($367) on

or before April 9th, 1888, three hundred and sixty-seven dollars ($367) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and the said plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of three hundred and sixty-seven dollars ($367) on or before April 9th, 1888, and the further sum of three hundred and sixty-seven dollars ($367) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its ma-
169 turity at eight (8) per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of three hundred and sixty-seven dollars ($367) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of fifty-eight dollars ($58), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of three hundred and sixty-seven dollars ($367) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of fifty-eight dollars ($58), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

170 And said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the

defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with seventy (70) shares of stock of the Irrigation Company of Pomona, representing $\frac{7}{10}$ of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which the said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract last aforesaid and by him heretofore, as aforesaid, promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said complainant the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the sums of money in the said last-mentioned contract and herein last before specified when he the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand dollars ($1,000).

171 And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the ninth day of April, 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of three hundred and sixteen dollars ($316) theretofore paid to it, the said defendant, after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of Los Angeles, State of California, and particularly described in said last-mentioned agreement, estimated to contain ten (10) acres of land, together with 50 shares of stock of the Irrigation Company of Pomona, representing $\frac{5}{10}$ of one inch of water under four (4) inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Irrigation Company of Pomona), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of the said last-mentioned premises the sum of nine hundred and fifty dollars ($950) in United States gold coin, to be paid as follows:

Three hundred and sixteen dollars ($316) on or before the
172 delivery of this contract, three hundred and seventeen dollars on or before April 9th, 1888, three hundred and seventeen dollars ($317) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight (8) per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, Detroit aforesaid, in United States gold coin, the sum of three hundred and seventeen dollars ($317) on or before April 9th, 1888, and the further sum of three hundred and seventeen dollars ($317) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of three hundred and seventeen dollars ($317) and interest thereon
from the said ninth day of April, A. D. 1887, at the rate of
173 eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of fifty dollars and seventy-two cents ($50.72), was added to the principal and thereafter bore like interest *and* eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid, and also that the said defendant made default in this, that said defendant did not on or before the ninth day of April, A. D. 1889, pay to the said plaintiff the sum of three hundred and seventeen dollars ($317) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of 8 per cent. per annum, payable annually, *nad* has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of fifty dollars and seventy-two cents ($50.72), was added to the principal and thereafter bore like interest at 8 per cent. per annum, of all of which the said defendant then and there had *fue* notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times

and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with fifty (50) shares of stock of the Irrigation Company of Pomona, representing $\frac{5}{10}$
174 of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said complainant the said sum of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay to it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of eight hundred dollars ($800).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the twenty-fifth day of April, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with the plaintiff, in writing and under seal, dated the ninth day of April, 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of two hundred and sixty-six dollars ($266) theretofore paid
175 to it, the said defendant, after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of Los Angeles, State of California, and particularly described in said last-mentioned agreement, estimated to contain 8 and $\frac{8}{10}$ acres of land, together with eighty (80) shares of stock of the Irrigation Company of Pomona, representing $\frac{8}{10}$ of one inch of water under four (4) inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by defendant subject to the by-laws of the said Irrigation Company of Pomona), when payment in full was made for the said real property

or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of eight hundred dollars ($800) in United States gold coin, to be paid as follows:

Two hundred and sixty-six dollars ($266) on or before the delivery of said contract, two hundred and sixty-seven dollars ($267) on or before April 9th, 1888, two hundred and sixty-seven dollars ($267) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of 8 per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterward, to wit, on the twenty-fifth day of April, 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of
176 the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of two hundred and sixty-seven dollars ($267) on or before April 9th, 1888, and the further sum of two hundred and sixty-seven dollars ($267) on or before April 9th, 1889, together with interest on said respective sums from April 9th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight (8) per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the ninth day of April, A. D. 1888, pay to the said plaintiff the sum of two hundred and sixty-seven dollars ($267) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of forty-two dollars and twenty-seven cents ($42 27), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the ninth day of April, A.
177 D. 1889, pay to the said plaintiff the sum of two hundred and sixty-seven dollars ($267) and interest thereon from the said ninth day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of forty-two dollars and twenty-seven cents ($42 27), was added to the principal and thereafter bore like interest at eight (8)

per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of Los Angeles, in the State of California, together with eighty (80) shares of stock of the Irrigation Company of Pomona, representing $\frac{8}{10}$ of one inch of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which the said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said — last aforesaid and by him heretofore last aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said complainant the said sums of money in the said last-
178 mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of six hundred and fifty dollars ($650).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the 23rd day of June, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the 15th day of April, 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of four hundred and sixty dollars ($460) theretofore paid to it by the said defendant and after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of San Bernardino, State of California, and particularly described in said last-mentioned agree-
ment, containedg eleven and $\frac{5}{10}$ acres of land, together with
179 115 shares of stock of the Palomares Irrigation Company, representing one and $\frac{15}{100}$ inches of water under four (4) inch pressure, measured from center of aperture (which said stock it was — between the plaintiff and defendant was to be delivered by the

plaintiff and accepted by the defendant subject to the by-laws of the said Palomares Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase — of said last-mentioned premises, the sum of eighteen hundred and forty dollars ($1,840) in United States gold coin, to be paid as follows:

$460 on or before the delivery of said contract, $690 on or before April 15th, 1888, $690 on or before April 15th, 1889, together with interest on said respective sums from April 15th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterward, to wit, on the 23rd day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay to the said plaintiff at, to wit, Pomona, to wit, Detroit aforesaid, in United States gold coin, the sum of six hundred and ninety dollars ($690) on or before April 15th, 1888, and the further sum of six hundred and ninety dollars ($690) on or before April 15th, 1889, together with interest on said respective sums from April 15th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so
180 paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the 15th day of April, A. D. 1888, pay to the said plaintiff the sum of six hundred and ninety dollars ($690) and interest thereon from the 15th day of April, A. D. 1887, at the rate of eight per cent. per annum, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of one hundred and ten dollars and forty cents ($110.40), was added to the principal and thereafter bore like interest at eight per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the 15th day of April, A. D. 1889, pay to the said plaintiff the sum of six hundred and ninety dollars ($690) and interest thereon from the said 15th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of one hundred and ten dollars and forty cents ($110.40), was added to the principal and thereafter bore like interest

at eight per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

181 And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred and fifteen shares of stock of the Palomares Irrigation Company, representing one and $\frac{15}{100}$ inches of water under four-inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum

182 of one thousand seven hundred dollars ($1,700).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the 23rd day of June, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the 15th day of April, A. D. 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of four hundred and seventy-two dollars ($472) theretofore paid to it by said defendant and after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of San Bernardino, State of California, and particularly described in said last-mentioned agreement, containing eleven and $\frac{8}{10}$ acres of land, together with one hundred and eighteen shares of stock of the Palomares Irrigation Company, representing one and $\frac{18}{100}$ inches of water under four-inch pressure, measured from center of aperture

(which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Palomares Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of the said last-mentioned premises, the sum of eighteen hundred and eighty-eight dollars ($1,888) in United States gold coin, to be paid as follows:

183 $472 on or before delivery of said contract, $708 on or before April 15th, 1888, $708 on or before April 15th, 1889, together with interest on said respective sums from April 15th, A. D. 1887, at the rate of eight per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterward, to wit, on the 23rd day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promises and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, — Detroit aforesaid, in United States gold coin, the sum of seven hundred and eight dollars on or before April 15th, 1888, and the further sum of seven hundred and eight dollars on or before April 15th, A. D. 1889, together with interest on said respective sums from April 15th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default *in* therein in this, that the said defendant did not on or before the 15th day of April, A. D. 1888, pay to the said plaintiff the sum of seven hundred and eight dollars ($708) and interest thereon from the said 15th day of April, 1887, at the rate of eight (8) per cent.

184 per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of one hundred and thirteen dollars and twenty-eight cents ($113.28), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not, on or before the 15th day of April, A. D. 1889, pay to the said plaintiff the sum of seven hundred and eight dollars ($708) and interest thereon from the said 15th day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that there-

upon, by its option, the interest money then maturing under said contract, to wit, the sum of $113.28, was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred and eighteen shares of stock of the Palomares Irrigation Company, representing one and $\frac{18}{100}$ inches of water under four (4)
185 inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which the said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the nineteenth day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand seven hundred dollars ($1,700).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the 23rd day of June, 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff in writing and under seal, dated the 15th day of April, A. D. 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of four hundred dollars ($400) theretofore paid to it by said
186 defendant and after the making of the payment and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of San Bernardino, State of California, and particularly described in said last-mentioned agreement, containing ten (10) acres of land,

together with one hundred (100) shares of stock of the irrigation company, representing one (1) inch of water under four-inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant and subject to the by-laws of the said Palomares Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of sixteen hundred dollars ($1,600) in United States gold coin, to be paid as follows:

Four hundred dollars ($400) on or before delivery of said contract, six hundred dollars ($600) on or before April 15th, A. D. 1888, six hundred dollars ($600) on or before April 15th, A. D. 1889, together with interest on said respective sums from April 15th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterwards, to wit, on the 23rd day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promises and agreement of said plaintiff in said last-mentioned agreement contained,
187 then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Detroit aforesaid, in United States gold coin, the sum of six hundred dollars ($600) on or before the 15th day of April, A. D. 1888, and the further sum of six hundred dollars ($600) on or before April 15th, A. D. 1889, together with interest on said respective sums from April 15th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did — nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the 15th day of April, A. D. 1888, pay to the said plaintiff the sum of six hundred dollars ($600) and interest thereon from the said 15th day of April, A. D. 1887, at the rate of eight (8) per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of ninety-six dollars, was added to the principal and thereafter bore like interest at eight per cent. per annum; of all of which the said defendant then — there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the 15th day of April, 1889, pay to the said plaintiff the sum of six hundred dollars ($600) and interest thereon from the 15th day of April, A. D. 1887, at the rate of eight per cent. per annum,
188 payable annually, and has not hitherto paid the same or any

part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of ninety-six dollars ($96), was added to the principal and thereafter bore like interest at eight per cent. per annum; of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further saith that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey be deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred (100) shares of stock of the Palomares Irrigation Company, representing one (1) inch of water under four-inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterwards requested, and, being so
189 liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the 19th day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in the sum of fourteen hundred and fifty dollars ($1,450).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the 23rd day of June, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the 15th day of April, A. D. 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of four hundred dollars ($400) theretofore paid to it by said defendant after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of San Bernardino, State of California, and particularly described in said last-mentioned agreement, containing ten (10) acres of land, together with one hundred (100)

shares of stock of the Palomares Irrigation Company, representing one (1) inch of water under four-inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Palomares
190 Irrigation Company), when payment in full was made for the said real property or land, agreed to pay the plaintiff, its successors or assigns, as the purchase price of the last-mentioned premises, the sum of sixteen hundred dollars ($1,600) in United States gold coin, to be paid as follows:

Four hundred dollars ($400) on or before the delivery of said contract, six hundred dollars on or before the 15th day of April, A. D. 1888, and six hundred dollars on or before the 15th day of April, A. D. 1889, together with interest on said respective sums from April 15th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said plaintiff, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterwards, to wit, on the 23rd day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promises and agreements of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, — Detroit aforesaid, in United States gold coin, the sum of six hundred dollars ($600) on or before the 15th day of April, A. D. 1888, and the further sum of six hundred dollars ($600) on or before the 15th day of April, A. D. 1889, together with interest on said respective sums from April 15th, 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

191 And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the 15th day of April, 1888, pay to the said plaintiff the sum of six hundred dollars ($600) and interest thereon from the said April 15th, 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof.

And the said plaintiff avers that thereupon, by its option, the interest money then maturing under the said contract, to wit, the sum of ninety-six ($96) dollars, was added to the principal and thereafter bore like interest at eight per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the 15th day of April, A. D. 1889, pay to the said plaintiff the sum of six hundred dollars ($600) and interest thereon from the said April 15th,

1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof.

And the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of ninety-six dollars ($96), was added to the principal and thereafter bore like interest at eight per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further saith that it has been at all times and is now ready and willing, upon the making of the pay-
192 ments and the full performance of the covenants in said contract agreed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred shares of stock of the Palomares Irrigation Company, representing one inch of water under four-inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which the said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant had negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterwards —, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, of fourteen hundred and fifty dollars ($1,450).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the 16th day of June, A. D. 1887, for a valu-
able consideration, entered into and signed a certain other
193 and different agreement with said plaintiff in writing and under seal, dated the 15th day of April, A. D. 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of two hundred and seventy-five dollars ($275) theretofore paid to it by said defendant, and after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of San Bernardino, State of California, and particularly described in

said last-mentioned agreement, containing ten and twenty-five one-thousandths acres of land, together with one hundred and twenty-five one-hundredths shares of stock of the Palomares Irrigation Company, representing one and twenty-five ten-thousandths inches of water under four-inch pressure, measured from center of aperture, (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Palomares Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of eleven hundred and two dollars and seventy-five cents ($1,102.75) in United States gold coin, to be paid as follows:

Two hundred and seventy-five dollars on or before delivery of said contract, four hundred and thirteen dollars and seventy-
194 five cents on or before April 15th, A. D. 1888, four hundred and fourteen dollars on or before the 15th day of April, A. D. 1889, together with interest on said respective sums from April 15th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said plaintiff, to be added to the principal and to bear like interest; and the said plaintiff further saith that the said defendant afterward, to wit, on the 16th day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, — Detroit aforesaid, in United States gold coin, the sum of four hundred and thirteen and seventy-five one-hundredths dollars ($413.75) on or before April 15th, A. D. 1888, and the further sum of four hundred and fourteen dollars ($414) on or before the 15th of April, A. D. 1889, together with interest on said respective sums from April 15th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default in this, that the said defendant did not, on or before the 15th day of April, A. D. 1888, pay to the said plaintiff the sum of four hundred and thirteen and seventy-five one-hundredths dollars
195 ($413.75) and interest thereon from the said 15th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six and twenty-four one-hundredths dollars ($66.24), was added to the principal and thereafter bore like interest at eight per cent. per annum, of all of which the said

defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not, on or before the 15th day of April, A. D. 1889, pay to the said plaintiff the sum of four hundred and fourteen dollars ($414) and interest thereon from the said 15th day of April, 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six and twenty-four hundredths dollars ($66.24), was added to the principal and thereafter bore interest at eight per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San
196 Bernardino, in the State of California, together with one hundred and twenty-five one-hundredths (100.25) shares of stock of the Palomares Irrigation Company, representing one and twenty-five ten-thousandths inches of water under four-inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof; by means whereof said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the nineteenth day — August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of eleven hundred dollars ($1,100).

And for that whereas also the said defendant, Henry Loud, heretofore, to wit, on the 16th day of June, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different contract with the said plaintiff, in writing and under seal, dated the
15th day of April, 1887, wherein and whereby the said defend-
197 ant, in consideration of the promise and agreement of the said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of

two hundred and seventy-five dollars ($275) theretofore paid to it by said defendant and after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of San Bernardino, State of California, particularly described in said last-mentioned agreement, containing ten and twenty-five one-thousandths acres of land, together with one hundred and twenty-five one-hundredths shares of stock of the Palomares Irrigation Company, representing one and twenty-five ten-thousandths inches of water under four-inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Palomares Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of eleven hundred and two and seventy-five one-hundredths dollars ($1,102.75) in United States gold coin, to be paid as follows:

Two hundred and seventy-five dollars on or before the delivery of said contract, four hundred and thirteen and seventy-five one-hundredths dollars ($413.75) on or before the 15th day of April, A. D. 1888, four hundred and fourteen dollars on or before the 15th day of April, A. D. 1889, together with interest on said respective sums from the 15th day of April, A. D. 1887, until paid, at the rate
198 of eight per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterwards, to wit, on the 16th day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin, the sum of four hundred and thirteen and seventy-five hundredths dollars ($413.75) on or before the 15th day of April, A. D. 1888, and the further sum of four hundred and fourteen dollars on or before the 15th day of April, A. D. 1889, together with interest on said respective sums from April 15th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the 15th day of April, A. D. 1888, pay to the said plaintiff the sum of four hundred and thirteen dollars and seventy-five cents ($413.75) and interest thereon from the

said 15th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the
199 said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six and twenty-four one-hundredths dollars, was added to the principal and thereafter bore like interest at eight per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And also that the said defendant made default in this, that said defendant did not on or before the 15th day of April, A. D. 1889, pay to the said plaintiff the sum of four hundred and fourteen dollars and interest thereon from the said 15th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six and twenty-four one-hundredths dollars, was added to the principal and thereafter bore like interest at eight per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further saith that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with one hundred and twenty-five one-hundredths shares of stock of the Palomares Irrigation Company, representing one and twenty-five ten-thousandths inches of water under four-inch pressure, meas-
200 ured from center of aperture, in accordance with the terms of said contract, of all of which the said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made, or any part thereof, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of eleven hundred dollars ($1,100).

And for that whereas also the said defendant, Henry M. Loud, here*inbe*fore, to wit, on the 16th day of June, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff in writing and under seal, dated the 15th day of April, A. D. 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of two hundred and seventy-five dollars ($275) theretofore paid to it by said defendant after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement
201 expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of San Bernardino, State of California, and particularly described in said last agreement, containing ten and twenty-five one-thousandths acres of land, together with $125\frac{1}{100}$ shares of stock of the Palomares Irrigation Company, representing one and twenty-five ten-thousandths inches of water under four-inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff *the* defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Palomares Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of eleven hundred and two and seventy-five one-hundredths — ($1,102.85) in United — gold coin, to be paid as follows:

Two hundred and seventy-five dollars on or before the delivery of said contract, four hundred and thirteen dollars and seventy-five one-hundredths dollars on or before the 15th day of April, A. D. 1888, four hundred and fourteen dollars on or before the 15th day of April, A. D. 1889, together with interest on said respective sums from April 15th, 1887, A. D., until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterward, to wit, on the 16th day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned
202 agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, Detroit aforesaid, in United States gold coin, the sum of four hundred and thirteen and seventy-five one-hundredths dollars ($413.75) on or before the 15th day of April, A. D. 1888, and the further sum of four hundred and fourteen dollars on or before the 15th day of April, A. D. 1889, together with interest on said respective sums from April 15th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal

and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the 15th day of April, A. D. 1888, pay to the said plaintiff the sum of four hundred and thirteen and seventy-five one-hundredth- dollars ($413.75) and interest thereon from the said 15th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six and twenty-four one-hundredths dollars, was added to the principal and thereafter bore like interest at eight per cent. per annum; of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said
203 defendant did not on or before the 15th day of April, A. D. 1889, pay to the said plaintiff the sum of four hundred and fourteen dollars and interest thereon from the 15th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof.

And the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six and twenty-four one-hundredths dollars was added to the principal and thereafter bore like interest at eight per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, State of California, together with one hundred and twenty-five one-hundredths shares of stock of the Palomares Irrigation Company, representing one and twenty-five thousandths inches of water under four-inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, at the city of Detroit aforesaid; but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract last aforesaid and by him heretofore, as aforesaid, promised to be made, or any part thereof; by means whereof said defendant then and
204 ther- became liable to pay the said plaintiff the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the nineteenth day of

August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of eleven hundred dollars ($1,100).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the 16th day of June, A. D. 1889, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the 15th day of April, A. D. 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement hereinbefore last mentioned contained that it would, in consideration of the sum of two hundred and seventy-five dollars ($275) theretofore paid to it by said defendant and after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of San Bernardino, State of California, and particularly described in said last-mentioned agreement, containing ten and twenty-five one-thou-
205 sandths acres of land, together with one hundred and twenty-five one-hundredths shares of stock of the Palomares Irrigation Company, representing one and twenty-five ten-thousandths inches of water under four-inch pressure, measured from center of aperture (which said stock it was agreed between the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Palomares Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of eleven hundred and two and seventy-five one-hundredths dollars ($1,102.75) in United States gold coin.

Two hundred and seventy-five dollars on or before delivery of said contract, four hundred and thirteen and seventy-five one-hundredths dollars ($413.75) on or before the 15th day of April, A. D. 1888, four hundred and fourteen dollars on or before the 15th day of April, A. D. 1889, together with interest on said respective sums from the 15th day of April, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest.

And the said plaintiff further saith that the said defendant afterwards, to wit, on the 16th day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona, to wit, at Detroit aforesaid, in United States gold coin,

the sum — four hundred and thirteen and seventy-five one-hun-
206 dredths dollars ($413.75) on or before the 15th day of April, A. D. 1888, and the further sum of four hundred and fourteen dollars on or before the 15th day of April, A. D. 1889, together with interest on said respective sums from April 15th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant, Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the 15th day of April, A. D. 1888, pay to the said plaintiff the sum — four hundred and thirteen and seventy-five one-hundredths dollars ($413.75) and interest thereon from the said 15th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six and twenty-four one-hundredths dollars, was added to the principal and thereafter bore like interest at eight per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the 15th day of April, A. D. 1888, pay to the said plaintiff the said sum of four hundred and fourteen dollars and interest thereon from the said 15th day of
April, A. D. 1887, at the rate of eight per cent. per annum,
207 payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of sixty-six and twenty-four one-hundredths dollars, was added to the principal and thereafter bore like interest at eight per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with 100 and $\frac{25}{100}$ shares of stock of the Palomares Irrigation Company, representing one and $\frac{25}{100}$ inches of water under four-inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which said defendant then and there had notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid; but that the said defendant has negligently refused as aforesaid to make said payments called for in said contract last aforesaid and by him heretofore as aforesaid promised to be made or any part thereof;

by means whereof said defendant then and there became liable to pay *the pay* to the said complainant the said sum of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward re-
208 quested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one thousand dollars ($1,000).

And for that whereas also the said defendant, Henry M. Loud, heretofore, to wit, on the 16th day of June, A. D. 1887, for a valuable consideration, entered into and signed a certain other and different agreement with said plaintiff, in writing and under seal, dated the 25th day of April, A. D. 1887, wherein and whereby the said defendant, in consideration of the promise and agreement of said plaintiff in said written agreement herei-before last mentioned that it would, in consideration of the sum of five hundred and fifty dollars ($550) theretofore paid to it by said defendant and after the making of the payments and full performance of the covenants thereafter in said last-mentioned agreement expressed to be made and performed by the said defendant, convey by deed of grant, bargain, and sale to the said defendant, his heirs or assigns, certain real property situated in the county of San Bernardino, State of California, and particularly described in said last-mentioned agreement, estimated to contain twenty (20) acres of land, together with 200 shares of stock of the Palomares Irrigation Company, representing two inches of water under four-inch pressure, measured from center of aperture (which said stock it was agreed between
209 the plaintiff and defendant was to be delivered by the plaintiff and accepted by the defendant subject to the by-laws of the said Palomares Irrigation Company), when payment in full was made for the said real property or land, agreed to pay to the plaintiff, its successors or assigns, as the purchase price of said last-mentioned premises, the sum of two thousand two hundred dollars ($2,200) in United States gold coin, to be paid as follows:

$550 on or before the delivery of said contract, $825 on or before April 25th, A. D. 1888, $825 on or before April 25th, A. D. 1889, together with interest on said respective sums from April 25th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, then said interest, at the option of said company, to be added to the principal and to bear like interest; and said plaintiff further saith that the said defendant afterward, to wit, on the 16th day of June, A. D. 1887, at, to wit, Pomona, to wit, at Detroit, in said county of Wayne and district and State of Michigan, in consideration of the promise and agreement of said plaintiff in said last-mentioned agreement contained, then and there promised the said plaintiff to pay it, the said plaintiff, at, to wit, Pomona,

to wit, Detroit aforesaid, in United States gold coin, the sum of $825 on or before April 25th, A. D. 1888, and the further sum of $825 on or before April 25th, A. D. 1889, together with interest on said respective sums from April 25th, A. D. 1887, until paid, at the rate of eight per cent. per annum, payable annually, the said interest on each and all of said sums, if not so paid, to be, at the option of said plaintiff, added to the principal and to bear interest from the date of its maturity at eight per cent. per annum.

And the said plaintiff further shows that the said defendant,
210 Henry M. Loud, did not nor would perform said agreement and promise on his part, but, on the contrary thereof, made default therein in this, that the said defendant did not on or before the 25th day of April, A. D. 1888, pay to the said plaintiff the sum of $825 and interest thereon from the said 25th day of April, 1887, at the rate of eight per cent. per annum, payable annually, as he had agreed, and has not hitherto paid the said sum of money or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of one hundred and thirty-two dollars ($132), was added to the principal and thereafter bore like interest at eight (8) per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid; and also that the said defendant made default in this, that said defendant did not on or before the 25th day of April, A. D. 1889, pay to the said plaintiff the sum of eight hundred and twenty-five dollars ($825) and interest thereon from the said 25th day of April, A. D. 1887, at the rate of eight per cent. per annum, payable annually, and has not hitherto paid the same or any part thereof; and the said plaintiff avers that thereupon, by its option, the interest money then maturing under said contract, to wit, the sum of one hundred and thirty-two dollars ($132), was added to the principal and thereafter bore like interest at 8 per cent. per annum, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further says that it has been at all times and is now ready and willing, upon the making of the payments and the full performance of the covenants in said contract expressed to be made and performed by the said Henry M. Loud, the defendant herein, to convey by deed of grant, bargain, and sale to
211 the said Henry M. Loud, the defendant herein, his heirs or assigns, the property described in said contract and situated in the county of San Bernardino, in the State of California, together with two hundred shares of stock of the Palomares Irrigation Company, representing two inches of water under four (4) inch pressure, measured from center of aperture, in accordance with the terms of said contract, of all of which the said defendant then and there had due notice, to wit, at Pomona, to wit, at the city of Detroit aforesaid, but that the said defendant has negligently refused, as aforesaid, to make said payments called for in said contract last aforesaid and by him heretofore, as aforesaid, promised to be made or any part thereof; by means whereof said defendant then and there became

liable to pay to the said complainant the said sums of money in the said last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of two thousand one hundred dollars ($2,100).

And for that whereas also heretofore, to wit, on the fifteenth day of April, A. D. 1887, the said defendant, by his writing under his hand and seal, for a valuable consideration, agreed to and with the said plaintiff, in consideration that the said plaintiff would
212 sell to him, the said defendant, certain real estate situated in the county of San Bernardino, in the State of California, together with the usual water right pertaining to said tract, said real estate being more particularly described as the northeast quarter of lot twenty-two (22), containing ten (10) acres of land, according to the map of the San Antonio tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, in the State of California, at the price of fifteen hundred dollars ($1,500) and on the terms of seventy-five dollars ($75) cash deposited with the said plaintiff at the date of the agreement; three hundred dollars ($300), first payment, within sixty days (60) *days* from date of agreement; five hundred and sixty-two dollars and fifty cents ($562.50), second payment, on or before April 15th, 1888, and five hundred and sixty-two dollars and fifty cents ($562.50), third payment, on or before April 15th, 1889, said two last payments to bear interest from the date of said agreement, at the rate of eight (8) per cent. per annum, payable annually, to purchase said property and pay for the same the said price of fifteen hundred dollars ($1,500) in manner following, to wit, seventy-five dollars ($75) deposited with the plaintiff on the date of said agreement; three hundred dollars ($300), first payment, within sixty days from the date of said agreement; five hundred and sixty-two dollars and fifty cents ($562.50), second payment, on or before April 15th, 1888, and five hundred and sixty-two dollars and fifty cents ($562.50), third payment, on or before April 15th, 1889, together with interest on said second and third payments from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually; and the said plaintiff further says that in consideration of the aforesaid agreement of said defendant and the payments by him, to wit,
213 of the said sum of seventy-five dollars ($75) — was deposited and the said sum of three hundred dollars, first payment on said agreement named, it, the said plaintiff, agreed then and there, to wit, at Pomona, in the State of California, to wit, at Detroit aforesaid, to sell to the said defendant the said real estate hereinabove last described, together with the usual water right per-

taining to said tract, at and for the price and upon the terms hereinabove last set forth; and said plaintiff further avers that by means thereof the said defendant became and was liable to pay it, the said plaintiff, the said several sums of money as hereinabove stated, and, being so liable, to wit, on April 15th, 1887, promised the said plaintiff then and there, to wit, at Pomona, California, to wit, at Detroit, in the county of Wayne and district and State of Michigan aforesaid, to pay to it, the said plaintiff, said sums of money at the times agreed, as aforesaid; but that the said plaintiff further avers that the said defendant did not perform and keep his agreements and promises in said last-mentioned writing and hereinabove last contained, and did not purchase said property in said last-mentioned agreement named, and did not pay for the same at the price and on the terms in said agreement set out, but, on the contrary, made default thereof in this, that the said defendant did not on or before the 15th day of April, 1888, and hath — hitherto paid the said sum of five hundred and sixty-two dollars and fifty cents ($562.50), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and also in this, that the said defendant did not on or before April 15th, 1889, and hath not hitherto paid the sum of five hundred and sixty-two dollars and fifty cents ($562.50), with interest
214 from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and the said plaintiff further avers that it has been ready and willing at all times and is now ready and willing to sell unto said defendant the premises described in the last-mentioned agreement upon the payment by him of the said sum of money by him as aforesaid agreed to be paid therefor, of all of which said defendant had due notice, to wit, at Pomona, California, to wit, at Detroit aforesaid, but said defendant has neglected and refused and still does neglect and refuse to pay the moneys in the last-mentioned agreement hereinabove specifically mentioned, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the last-mentioned contract and hereinabove specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although thereafter frequently requested to do, has not paid the same or any part thereof, to the plaintiff's damage in a large sum of money, to wit, in the sum of two thousand dollars ($2,000).

And for that whereas also heretofore, to wit, on the fifteenth day of April, A. D. 1887, the said defendant, by his writing under his hand and seal, for a valuable consideration, agreed to and with the said plaintiff, in consideration that the said plaintiff would sell to him, the said defendant, certain real

estate situated in the county of San Bernardino, in the
215 State of California, together with the usual water right pertaining to said tract, said real estate being more particularly described as the southeast quarter of lot thirty-five (35), containing ten (10) acres of land, according to the map of San Antonio tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, in the State of California, at the price of sixteen hundred dollars ($1,600), and on the terms of eighty dollars ($80) cash deposited with the said plaintiff at the date of the agreement, three hundred and twenty dollars ($320), first payment, within sixty (60) days from date of agreement; six hundred dollars ($600), second payment, on or before April 15th, 1888, and six hundred dollars ($600), third payment, on or before April 15th, 1889, said two last payments to bear interest from date of said agreement at the rate of eight (8) per cent. per annum, payable annually, to purchase said property and pay for the same the said price of sixteen hundred dollars ($1,600) in manner following, to wit, eighty dollars ($80) deposited with plaintiff on the date of said agreement, three hundred and twenty dollars ($320), first payment, within sixty days from the date of said agreement; six hundred dollars ($600), second payment, on or before April 15th, 1888, and six hundred dollars ($600), third payment, on or before April 15th, 1889, together with interest on said second and third payments from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually; and the said plaintiff further says that in consideration of the aforesaid agreement of said defendant and the payments by him, to wit, of the said sum of eighty dollars ($80) deposited and the said sum of three hundred and twenty dollars, first payment in said agreement named, it, the said defendant, agreed then and there, to wit, at
216 Pomona, in the State of California, to wit, at Detroit aforesaid, to sell to the said plaintiff the said real estate hereinabove last described, together with the usual water right pertaining to said tract, to and for the price and upon the terms hereinabove last set forth; and said plaintiff further avers that by means thereof the said defendant became and was liable to pay it, the said plaintiff, the said several sums of money as hereinabove stated, and, being so liable, to wit, on April 15th, 1887, promised the said plaintiff then and there, to wit, at Pomona, California, to wit, at Detroit, in the county of Wayne and district and State of Michigan aforesaid, to pay it, the said plaintiff, said sums of money at the times agreed as aforesaid; but the said plaintiff avers that the said defendant did not perform and keep his agreements and promises in said last-mentioned writing and hereinabove last contained and did not purchase said property in said last-mentioned agreement named and did not pay for the same at the price and on the terms in said agreement set out, but, on the contrary, made default thereof in this, that the said defendant did not on or before April 15th, 1888, and hath not hitherto paid the sum of six hundred dollars ($600), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and also in this, that the defendant did not on or be-

fore April 15th, 1889, and hath not hitherto paid the sum of six hundred dollars ($600), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and the said plaintiff further avers that it has been ready and willing at all times and now is ready and willing to sell unto said defendant the premises described in the last-mentioned
217 agreement upon the payment by him of the said sum of money by him as aforesaid agreed to be paid therefor, of all of which the said defendant had due notice, to wit, at Pomona, California, to wit, at Detroit aforesaid, but said defendant has neglected and refused and still does neglect and refuse to pay the monies in the last-mentioned agreement hereinabove specifically mentioned, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the last-mentioned contract and hereinabove specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although thereafter frequently requested to do, has not paid the same or any part thereof, to the plaintiff's damage in a large sum of money, to wit, in the sum of two thousand dollars ($2,000).

And for that whereas also heretofore, to wit, on the fifteenth day of April, A. D. 1887, the said defendant, by his writing, under his hand and seal, for a valuable consideration, agreed to and with the said plaintiff, in consideration that the said plaintiff would sell to him, the said defendant, certain real estate situated in the county of San Bernardino, in the State of California, together with the usual water right pertaining to said tract, said real estate being more particularly described as the southwest quarter of lot twenty-two
218 (22), containing twelve and five-tenths acres (12.5) of land, according to the map of the San Antonio tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, in the State of California, at the price of one thousand eight hundred and seventy-five dollars ($1,875) and on the terms of ninety-four dollars ($94) cash deposited with the said plaintiff at the date of the agreement, three hundred and seventy-six dollars ($376), first payment, within sixty (60) days from date of agreement; seven hundred and two dollars and fifty cents ($702.50), second payment, on or before April 15th, 1888, and seven hundred and two dollars and fifty cents ($702.50), third payment, on or before April 15th, 1889, said two last payments to bear interest from date of said agreement at the rate of eight (8) per cent. per annum, payable annually, to purchase said property and pay for the same the said price of one thousand eight hundred and seventy-five dollars ($1,875) in manner following, to wit, ninety-four dollars ($94) deposited with the plaintiff on the date of said agreement, three hundred and seventy-six dollars ($376)

first payment, within sixty (60) days days from the date of said agreement; seven hundred and two dollars and fifty cents ($702.50), second payment, on or before April 15th, 1888, and seven hundred and two dollars and fifty cents ($702.50), third payment, on or before April 15th, 1889, together with interest on said second and third payments from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually; and the said plaintiff further says that in consideration of the aforesaid agreement of said defendant and by the payments by him, to wit, of the said sum of ninety-four — ($94) deposited and the said sum of three hundred and seventy-six dollars, first payment in said agreement named, it, the said defendant, agreed then and there, to wit, at Pomona, in
219 the State of California, to wit, at Detroit aforesaid, to sell to the said plaintiff the said real estate hereinabove last described, together with the usual water right pertaining to said tract, to and for the price and upon the terms hereinabove last set forth; and said plaintiff further avers that by means thereof the said defendant became and was liable to pay it, the said plaintiff, the several sums of money as hereinabove stated, and, being so liable, promised the said plaintiff then and there, to wit, at Pomona, California, to wit, at Detroit, in the county of Wayne and district and State of Michigan aforesaid, to pay to *the* it, the said plaintiff, said sums of money at all times agreed upon as aforesaid; but the said plaintiff further avers that the said defendant did not perform and keep his agreements and promise- in said last-mentioned writing and hereinabove last contained, and did not purchase said property in said last-mentioned agreement named, and did not pay for the same at the price and on the terms in said agreement set out, but, on the contrary, made default thereof in this, that the said defendant did not on or before April 15th, 1888, and hath not hitherto paid the sum of seven hundred and two dollars and fifty cents ($702.50), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and also in this, that the said defendant did not on or before April 15th, 1889, and hath not hitherto paid the sum — seven hundred and two dollars and fifty cents ($702.50), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and the said plaintiff further avers that it has been ready and willing at all times and now is ready and willing to sell
220 unto said defendant the premises described in the last-mentioned agreement upon the payment by him of the said sum of money by him as aforesaid agreed to be paid therefor, of all of which said defendant had due notice, to wit, at Pomona, California, to wit, at Detroit aforesaid, but said defendant neglected and refused and still does neglect and refuse to pay the monies in the last-mentioned agreement hereinabove specifically mentioned, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the last-mentioned contract and hereinabove specified when he, the said defendant, should be thereunto afterward requested, and, being so

liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although thereafter frequently requested to do, has not paid the same or any part thereof, to the plaintiff's damage in a large sum of money, to wit, in the sum of two thousand dollars ($2,000).

And for that whereas also heretofore, to wit, on the fifteenth day of April, A. D. 1887, the said defendant, by his writing under his hand and seal, for a valuable consideration, agreed to and with the said plaintiff, in consideration that the said plaintiff would sell to him, the said defendant, certain real estate situated in the county of San Bernardino, in the State of California, together with the usual water right pertaining to said tract, said real estate being particularly described as the south-
221 west quarter of lot thirty-five (35), containing ten (10) acres of land, according to the map of the San Antonio tract, duly recorde- in Book 3, page 7, of maps, records of San Bernardino county, in the State of California, at the price of sixteen hundred dollars ($1,600) and on the terms of eighty dollars ($80) cash deposited with the said plaintiff at the date of the agreement, three hundred and twenty dollars ($320), first payment, within sixty (60) days from the date of agreement; six hundred dollars ($600), second payment, on or before April 15th, 1888, and six hundred dollars ($600), third payment, on or before April 15th, 1889, said two last payments to bear interest from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually, to purchase said property and pay for the same the said price of sixteen hundred dollars ($1,600) in manner following, to wit, eighty dollars ($80) deposited with the plaintiff on the date of said agreement, three hundred and twenty dollars ($320), first payment, within sixty days (60) from the date of said agreement; six hundred dollars ($600), second payment, on or before April 15th, 1888, and six hundred dollars ($600), third payment, on or before April 15th, 1889, together with interest on said second and third payments from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually; and the said plaintiff further says that in consideration of the aforesaid agreement of said defendant and the payments by him, to wit, of the said sum of eight- dollars (80) deposited and the said sum of three hundred and twenty dollars ($320), first payment in said agreement named, it, the said defendant, agreed then and there, to wit, at Pomona, in the State of California, to wit, at Detroit aforesaid, to sell to the said plaintiff the said real estate hereinabove last described, to-
222 gether with the usual water right pertaining to said tract, to and for the price and upon the terms hereinabove last set forth; and said plaintiff further avers that by means whereof the said defendant became liable to pay it, the said plaintiff, the said several sums of money as hereinabove stated, and, being so liable, promised

the said plaintiff then and there, to wit, at Pomona, California, to wit, at Detroit, in the county of Wayne and district and State of Michigan aforesaid, to pay to it, the said plaintiff, said sums of money at the times agreed as aforesaid; but the said plaintiff further avers that the said defendant did not perform and keep his agreements and promises in said last-mentioned writing and hereinabove last contained, and did not purchase said property in said last-mentioned agreement named, and did not pay for the same at the price and on the terms in said agreement set out, but, on the contrary, made default thereof in this, that the said defendant did not, on or before April 15th, 1888, and hath not hitherto paid the sum of six hundred dollars ($600), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and also in this, that the said defendant did not, on or before April 15th, 1889, and hath not hitherto paid the sum of six hundred dollars ($600), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum payable annually, or any part thereof; and the said plaintiff further avers that it has been ready and willing at all times and now is ready and willing to sell unto — the premises described in the last-mentioned agreement upon the payment by him of the said sum of money by him as aforesaid agreed to be paid therefor, of all of which said defendant had due notice, to wit,
223 at Pomona, California, to wit, at Detroit aforesaid, but said defendant has neglected and refused and still does neglect and refuse to pay the monies in the last-mentioned agreement hereinabove specifically mentioned; by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the last-mentioned contract and hereinabove specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although thereafter frequently requested to do, has not paid the same or any part thereof, to the plaintiff's damage in a large sum of money, to wit, in the sum of two thousand dollars ($2,000).

And for that whereas also heretofore, to wit, on the fifteenth day of April, A. D. 1887, the said defendant, by his writing under his hand and seal, for a valuable consideration, agreed to and with the said plaintiff, in consideration that the said plaintiff would sell to him, the said defendant, certain real estate situated in the county of San Bernardino, in the State of California, together with the usual water right pertaining to said tract, said real estate being more particularly described as the northwest quarter of lot thirty-five (35), containing twelve and two-tenths (12.2) acres of land, according to the map of the San Antonio tract, duly recorded in

Book 3, page 7, of maps, records of San Bernardino county,
224 in the State of California, at the price of one thousand nine hundred and fifty-two dollars ($1,952) and on the terms of ninety-eight dollars ($98) cash deposited with the said plaintiff at the date of the agreement; three hundred and ninety dollars ($390), first payment, within sixty (60) days from the date of agreement; seven hundred and thirty-two dollars ($732), second payment, on or before April 15th, 1888, and seven hundred and thirty-two dollars ($732), third payment, on or before April 15th, 1889, said two last payments to bear interest from date of said agreement at the rate of eight (8) per cent. per annum, payable annually, to purchase said property and pay for the same the said price of one thousand nine hundred and fifty-two dollars ($1,952) in manner following, to wit, ninety-eight dollars ($98) deposited with the plaintiff on the date of said agreement; three hundred and ninety dollars ($390), first payment, within sixty days from the date of said agreement; seven hundred and thirty-two dollars ($732), second payment, on or before April 15th, 1888, and seven hundred and thirty-two dollars ($732), third payment, on or before April 15th, 1889, together with interest on said second and third payments from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually; and the said plaintiff further says that in consideration of the aforesaid agreement of said defendant and the payments by him, to wit, of the said sum of ninety-eight dollars ($98) deposited and the said sum of three hundred and ninety dollars, first payment, in said agreement named, it, the said defendant, agreed then and there, to wit, at Pomona, in the State of California, to wit, at Detroit aforesaid, to sell to the said plaintiff the said real estate hereinabove last described, together with the usual water right pertaining to said tract, to and for the price and upon the terms
225 hereinabove last set forth; and the said plaintiff further avers that by means thereof the said defendant became and was liable to pay it, the said plaintiff, the said several sums of money as hereinabove stated, and, being liable, promised the said plaintiff then and there, to wit, at Pomona, California, to wit, at Detroit, in the county of Wayne and district and State of Michigan aforesaid, to pay to it, the said plaintiff, said sums of money at the times agreed as aforesaid; but the said plaintiff further avers that the said defendant did not perform and keep his agreements and promises in said last-mentioned writing and hereinabove last contained, and did not purchase said property in said last-mentioned agreement named, and did not pay for the same at the price and on the terms in said agreement set out, but, on the contrary, made default thereof in this, that the said defendant did not on or before April 15th, 1888, and hath not hitherto paid the sum of seven hundred and thirty-two dollars ($732), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and also in this, that the said defendant did not on or before April 15th, 1889, and hath not hitherto paid the sum of seven hundred and thirty-two

dollars ($732), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and the said plaintiff further avers that it has been ready and willing at all times and now is ready and willing to sell unto said defendant the premises described in the last-mentioned agreement upon the payment by him of the said sum of money by him as aforesaid agreed to be paid therefor;

226 of all of which said defendant had due notice, to wit, at Pomona, California, to wit, at Detroit aforesaid, but said defendant has neglected and refused and still does neglect and refuse to pay the monies in the last-mentioned agreement hereinabove specifically mentioned, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the last-mentioned contract and hereinabove specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although thereafter frequently requested to do, has not paid the same or any part thereof, to the plaintiff's damage in a large sum of money, to wit, in the sum of two thousand dollars ($2,000).

And for that whereas also heretofore, to wit, on the fifteenth day of April, A. D. 1887, the said defendant, by his writing under his hand and seal, for a valuable consideration, agreed to and with the said plaintiff, in consideration that the said plaintiff would sell to him, the said defendant, certain real estate situated in the county of San Bernardino, in the State of California, together with the usual water right pertaining to said tract, said real estate more particularly described as the northeast quarter of lot thirty-five (35), containing twelve and six-tenths (12.6) acres of land, according to the map of the San Antonio tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, in

227 the State of California, at the price of two thousand and sixteen dollars ($2,016) and on the terms of one hundred dollars ($100) cash deposited with the said plaintiff at the date of the agreement; four hundred and four dollars ($404), first payment, within sixty days (60) from the date of agreement; seven hundred and fifty-six dollars ($756), second payment, on or before April 15th, 1888, and seven hundred and fifty-six dollars ($756), third payment, on or before April 15th, 1889, said two last payments to bear interest from date of said agreement at the rate of eight (8) per cent. per annum, payable annually, to purchase said property and pay for the same the said price of two thousand and sixteen dollars ($2,016) in manner following, to wit, one hundred dollars ($100) deposited with the plaintiff on the date of said agreement; four hundred and four dollars ($404), first payment, within sixty days from the date of said agreement; seven hundred and fifty-six dollars ($756), second payment, on or before April 15th, 1888, and

seven hundred and fifty-six dollars ($756) on or before April 15th, 1889, together with interest on said second and third payments from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually; and the said plaintiff further says that in consideration of the aforesaid agreement of said defendant and the payments by him, to wit, of the said sum of one hundred dollars ($100) deposited and the sum of four hundred and four dollars, first payment, in said agreement named, it, the said defendant, agreed then and there, to wit, at Pomona, in the State of California, to wit, at Detroit aforesaid, to sell to the said plaintiff the said real estate hereinabove last described, together with the usual water right pertaining to said tract, to and for the price and upon the terms
228 hereinabove last set forth; and said plaintiff further avers that by means thereof the said defendant became and was liable to pay it, the said plaintiff, the said several sum- of money as hereinabove stated, and, being so liable, promised the said plaintiff then and there, to wit, at Pomona, California, to wit, at Detroit, in the county of Wayne and district and State of Michigan aforesaid, to pay to it, the said plaintiff, said sums of money at the times agreed as aforesaid; but the said plaintiff further avers that the said defendant did not perform and keep his agreements and promises in said last-mentioned writing and hereinabove last contained, and did not purchase said property in said last-mentioned agreement named, and did not pay for the same at the price and on the terms in said agreement set out, but, on the contrary, made default thereof in this, that the said defendant did not on or before April 15th, 1888, and hath — hitherto paid the sum of seven hundred and fifty-six dollars ($756), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and also in this, that the said defendant did not on or before April 15th, 1889, and hath not hitherto paid the sum of seven hundred and fifty-six dollars ($756), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and the said plaintiff further avers that it has been ready and willing at all times and now is ready and willing to sell unto said defendant the premises described in the last-mentioned agreement upon the payment by him of the said sum of money by him as aforesaid agreed to be paid therefor, of all of which said defendant had due notice, at Pomona, California, to wit, at Detroit aforesaid; but said defendant
229 has neglected and refused and still does neglect and refuse to pay the monies in the last-mentioned agreement hereinabove specifically mentioned, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said last-mentioned contract and hereinabove specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it

the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto requested, but, although thereafter frequently requested to do, has not paid the same or any part thereof, to the plaintiff's damage in a large sum of money, to wit, in the sum of two thousand dollars ($2,000).

And for that whereas also heretofore, to wit, on the fifteenth day of April, A. D. 1887, the said defendant, by his writing under his hand and seal, for a valuable consideration, agreed to and with the said plaintiff, in consideration that the said plaintiff would sell to him, the said defendant, certain real estate situated in the county of San Bernardino, in the State of California, together with the usual water right pertaining to said tract, said real estate being more particularly described as the northwest quarter of lot twenty-two (22), containing eight and seven-tenths (8.7) acres of land, according to the map of the San Antonio tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, in the State of California,
at the price of one thousand three hundred and five dollars
230 ($1,305) and on the terms of sixty-five dollars ($65) cash deposited with the said plaintiff at the date of the agreement, two hundred and sixty dollars ($260), first payment, within sixty (60) days from the date of agreement; four hundred and ninety dollars ($490), second payment, on or before April 15th, 1888, and four hundred and ninety dollars ($490), third payment, on or before April 15th, 1889, said two last payments to bear interest from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually, to purchase said property and pay for the same the said price of one thousand three hundred and five dollars ($1,305) in manner following, to wit, sixty-five dollars ($65) deposited with the plaintiff on the date of said agreement, two hundred and sixty dollars ($260), first payment, within sixty (60) days from the date of said agreement; four hundred and ninety dollars ($490), second payment, on or before April 15th, 1888, and four hundred and ninety dollars ($490), third payment, on or before April 15th, 1889, together with interest on said second and third payments from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually; and the said plaintiff further avers that in consideration of the aforesaid agreement of said defendant and the payments by him, to wit, of the said sum of sixty-five dollars ($65) deposited and the said sum of two hundred and sixty dollars, first payment in said agreement named, it, the said defendant, agreed then and there, to wit, at Pomona, in the State of California, to wit, at Detroit aforesaid, to sell to the said plaintiff the said real estate hereinabove last described, together with the usual water right pertaining to the said tract, to and for the price and upon the terms hereinabove last set forth; and said plaintiff further avers that by
231 means thereof the said defendant became and was liable to pay it, the said plaintiff, the said several sums of money as hereinabove stated, and, being so liable, promised the said plaintiff then and there, to wit, at Pomona, California, to wit, at Detroit, in the county of Wayne and district and State of Michigan aforesaid,

to pay to it, the said plaintiff, said sums of money at the times agreed as aforesaid; but the said plaintiff further avers that the said defendant did not perform and keep his agreements and promises in said last-mentioned writing and hereinabove last contained, and did not purchase said property in said last-mentioned agreement named, and did not pay for the same at the price and on the terms in said agreement set out, but, on the contrary, made default thereof in this, that the said defendant did not on or before April 15th, 1888, and hath not hitherto paid the sum of four hundred and ninety dollars ($490), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and also in this, that the said defendant did not on or before April 15th, 1889, and hath not hitherto paid the sum of four hundred and ninety dollars ($490), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and the said plaintiff further avers that it has been ready and willing at all times and now is ready and willing to sell unto said defendant the premises described in the last-mentioned agreement upon the payment by him of the said sum of money by him as aforesaid agreed to be paid therefor, of all of which said defendant had due notice, to wit, at Pomona, California, to wit, at Detroit aforesaid, but said defendant has
232 neglected and refused and still does neglect and refuse to pay the monies in the last-mentioned agreement hereinabove specifically mentioned, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the last-mentioned contract and hereinabove specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then — there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although thereafter frequently requested to do, has not paid the same or any part thereof, to the plaintiff's damage in a large sum of money, to wit, in the sum of two thousand dollars ($2,000).

And for that whereas also heretofore, to wit, on the fifteenth day of April, A. D. 1887, the said defendant, by his writing under his hand and seal, for a valuable consideration, agreed to and with the said defendant, in consideration that the said plaintiff would sell to him, the said defendant, certain real estate situated in the county of San Bernardino, in the State of California, together with the usual water right pertaining to said tract, said real estate being more particularly described as the southeast quarter of lot twenty-two (22), containing ten (10) acres of land, according to the map of the San Antonio tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, in the State of California, at the price of one thousand five hundred dollars ($1,500) and on the terms of seventy-

five dollars ($75) cash deposited with the said plaintiff at the
233 date of the agreement, three hundred dollars ($300), first payment, within sixty days (60) from date of agreement; five hundred and sixty-two dollars and fifty cents ($562.50), second payment, on or before April 15th, 1888, and five hundred and sixty-two dollars and fifty cents ($562.50), third payment, on or before April 15th, 1889, said two last payments to bear interest from date of said agreement at the rate of eight (8) per cent. per annum, payable annually, to purchase said property and pay for the same the said price of one thousand five hundred dollars ($1,500) in manner following, to wit, seventy-five dollars ($75) deposited with the plaintiff on the date of said agreement, three hundred dollars ($300), first payment, within sixty days (60) from the date of said agreement; five hundred and sixty-two dollars and fifty cents ($562.50), second payment, on or before April 15th, 1888, and five hundred and sixty-two dollars and fifty cents ($562.50), third payment, on or before April 15th, 1889, together with interest on said second and third payments from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually; and the said plaintiff further says that in consideration of the aforesaid agreement of said defendant and the payments by him, to wit, of the said sum of seventy-five dollars ($75) deposit and the said sum of three hundred dollars, first payment in said agreement named, it, the said defendant, agreed then and there, to wit, at Pomona, in the State of California, to wit, at Detroit aforesaid, to sell to the said plaintiff the said real estate hereinabove last described, together with the usual water right pertaining to said tract, to and for the price and upon the terms hereinabove last set forth; and the said plaintiff further avers that by means thereof the said defendant became and was liable to
234 pay it, the said plaintiff, the said several sums of money as hereinabove stated, and, being so liable, promised the said plaintiff then and there, to wit, at Pomona, California, to wit, at Detroit, in the county of Wayne and district and State of Michigan aforesaid, to pay to it, the said plaintiff, said sums of money at the times agreed as aforesaid; but the said plaintiff further avers that the said defendant did not perform and keep his agreements and promises in said last-mentioned writing and hereinabove last contained, and did not purchase said property in said last-mentioned agreement named, and did not pay for the same at the price and on the terms in said agreement set out, but, on the contrary, made default thereof in this, that the said defendant did not on or before April 15th, 1888, and hath not hitherto paid the sum of five hundred and sixty-two dollars and fifty cents ($562.50), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof, and also in this, that the said defendant did not on or before April 15th, 1889, and hath not hitherto paid the sum of five hundred and sixty-two dollars and fifty cents, with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof; and the said plaintiff further avers that it has been ready and willing at all times

and now is ready and willing to sell unto said defendant the premises described in the last-mentioned agreement upon the payment by him of the said sum of money by him as aforesaid agreed to be paid therefor, of all of which said defendant had due notice, to wit, at Pomona, California, to wit, at Detroit aforesaid, but said defendant has neglected and refused and still does neglect and refused
235 to pay the moneys in the last-mentioned agreement hereinabove specifically mentioned, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the last-mentioned contract and hereinabove specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterward requested, but, although thereafter frequently requested to do, has not paid the same or any part thereof, to the plaintiff's damage in a large sum of money, to wit, in the sum of two thousand dollars ($2,000).

And for that whereas also heretofore, to wit, on the eighth day of April, A. D. 1887, the said defendant, by his writing under his hand and seal, for a valuable consideration, agreed to and with the said plaintiff, in consideration that the said plaintiff would sell to him, the said defendant, certain real estate situated in the county of Los Angeles, in the State of California, together with the usual water right pertaining to said tract, said real estate being more particularly described as lot eleven (11), containing forty and nine-tenths (40.9) acres of land, according to the map of the northeast Pomona tract, duly recorded in Book 5, on page 461, of miscellaneous records of Los Angeles county, in the State of California, at the price of ten thousand two hundred and twenty-five dollars ($10,225) and on the terms of five hundred and ten dollars ($510) cash de-
236 posited with the said plaintiff at the date of the agreement, two thousand and forty-five dollars ($2,045), first payment, within sixty days (60) from date of agreement; three thousand eight hundred and thirty-five dollars ($3,835), second payment, on or before April 8th, 1888, and three thousand eight hundred and thirty-five dollars ($3,835), third payment, on or before April 8th, 1889, said two last payments to bear interest from date of said agreement at the rate of eight (8) per cent. per annum, payable annually, to purchase said property and pay for the same the said price of ten thousand and two hundred and twenty-five dollars ($10,225) in manner following, to wit, five hundred and ten dollars ($510) deposited with the plaintiff on the date of said agreement, two thousand and forty-five dollars ($2,045), first payment, within sixty *days* (60) days from the date of said agreement; three thousand eight hundred and thirty-five dollars ($3,835), second payment, on or before April 8th, 1888, and three thousand eight hundred and thirty-five dollars ($3,835), third payment, on or

before April 8th, 1888, together with interest on said second and third payments from the date of said agreement at the rate of eight (8) per cent. per annum, payable annually; and the said plaintiff further says that in consideration of the aforesaid agreement of said defendant and the payments by him, to wit, of the said sum of five hundred and ten dollars ($510) deposited, it, the said defendant, agreed then and there, to wit, at Pomona, in the State of California, to wit, at Detroit aforesaid, to sell to the said plaintiff the said real estate hereinabove last described, together with the usual water right pertaining to said tract, to and for the price and upon the terms hereinabove last set forth; and said plaintiff further avers
237 that by means thereof the said defendant became and was liable to pay it, the said plaintiff, the several sums of money as hereinabove stated, and, being so liable, promised the said plaintiff then and there, to wit, at Pomona, California, to wit, at Detroit, in the county of Wayne and district and State of Michigan aforesaid, to pay to it, the said plaintiff, said sums of money at the times agreed as aforesaid; but the said plaintiff further avers that the said defendant did not perform and keep his agreements and promises in said last-mentioned writing and hereinabove last contained, and did not purchase said property in said last-mentioned agreement named, and did not pay for the same at the price and on the terms in said agreement set out, but, on the contrary, made default thereof in this, that the said defendant did not within sixty days from the date of said last-mentioned agreement pay the said sum of two thousand and forty-five dollars ($2,045) stipulated therein to be paid within the time aforesaid, and hath not hitherto paid the same, but has only paid a portion thereof, to wit, the sum of one thousand dollars ($1,000), and hath hitherto neglected and refused and still does neglect and refuse to pay the said remaining portion of said first payment, to wit, the sum of one thousand and forty-five dollars ($1,045), or any part thereof, and has also made default thereof in this, that the said defendant did not on or before April 8th, 1888, and hath not hitherto paid the sum of three thousand eight hundred and thirty-five dollars ($3,835), with interest thereon from the date of said last-mentioned agreement at the rate of eight (8) per cent. per annum, payable annually, or any part thereof, and has also made default thereof in this, that the said defendant did not on or before April 8th, 1889, and hath not hitherto paid
238 the sum of three thousand eight hundred and thirty-five dollars ($3,835), with interest thereon from the date of said last-mentioned agreement at the rate of eight per cent. per annum, payable annually, or any part thereof; and said plaintiff further saith that said defendant, notwithstanding his said default in payment as aforesaid, took possession of said last-described lands and entered upon the sale and did and caused to be done work thereon, and plaintiff further saith that said defendant offered the same and portions thereof for *the* sale to the public, and placed signs thereon announcing to the public that the said premises were for sale and the names of his agents.

And said plaintiff further saith that, notwithstanding the default

of said defendant as aforesaid, but relying upon the full payment by defendant of the said sums last aforesaid and his performance of the agreement upon his part, the said plaintiff not only suffered the said defendant to take possession and exercise the aforesaid acts of ownership over said lands, but also has expended a large sum of money, to wit, the sum of two thousand dollars ($2,000), in constructing a good and substantial pipe line to said premises of sufficient capacity to supply said premises with all the water called for by said agreement, and procured and furnished in said pipe line, ready for delivery to the said premises last mentioned, all the water called for by the terms of said agreement, together with all the proper and necessary appliances for delivering to said premises and for their use the amount of water to which, under said last-mentioned contract and agreement, they were entitled; of all of which the said defendant had full notice then and there, to wit, at Pomona aforesaid, to wit, at Detroit aforesaid.

And the plaintiff avers that it has been ready and willing at
239 all times and now is ready and willing to sell unto said defendant the premises described in the last-mentioned agreement upon the payment by him of the said sums of money by him as aforesaid agreed to be paid therefor, of all of which said defendant had due notice, to wit, at Pomona, California, to wit, at Detroit aforesaid, but said defendant has neglected and refused and still does neglect and refuse to pay the monies in the last-mentioned agreement hereinabove specifically mentioned, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the last-mentioned contract and hereinbefore specified when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, to wit, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sums of money in the said last-mentioned contract and herein last before specified when he, the said defendant, should be thereunto afterwards requested, but, although thereafter frequently requested so to do, has not paid the same or any part thereof, to the plaintiff's damage in a large sum of money, to wit, in the sum of eleven thousand dollars ($11,000).

And for that whereas also the said defendant heretofore, to wit, on the 25th day of April, A. D. 1887, entered into an agreement under his hand and seal, dated March 30th, 1887, to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county
240 of Los Angeles, State of California, described in said last-mentioned agreement, to wit, block 239 of the Pomona tract, according to the map of said tract duly recorded in Book 3, pages 96 and 97, of miscellaneous records of Los Angeles county, State of California, which said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said de-

fendant and purchased by said defendant from said plaintiff, to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of said agreement for the sale of said above premises upon the premises therein and hereinbefore described, and in default of the defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agrees, for the consideration aforesaid, to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was assessed upon said last-described premises for State and county taxes for the year 1888, to wit, the taxes for the State of California and for the county of Los Angeles, a large sum of money, to wit, the sum of twenty-five dollars ($25), which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further saith that, notwithstanding the assessment of said taxes and notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay *to* the said sum last above men-
241 tioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said premises from said taxes by payment of a large sum of money, to wit, the sum of fifty dollars ($50), of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money last mentioned when he, the said defendant, should be thereunto afterward requested, and, being so liable, he, the said defendant, in consideration thereof, afterward, on the nineteenth day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterward requested, but, although often so requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of one hundred dollars ($100).

And for that whereas also the said defendant heretofore, to wit, on the 16th day of June, A. D. 1887, entered into an agreement under his hand and seal, dated April 15th, A. D. 1887, to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county of San Bernardino, State of California, described in said last-mentioned agreement, to wit, the northeast quarter of lot 43 of the San Antonio tract, according to map of said
242 tract duly recorded in Book 3, page 7, of maps, records — San

Bernardino, State of California, when said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff, to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of said agreement for the sale of said above-described premises upon the premises therein and hereinbefore described, and in default of the defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was duly assessed upon said last-described premises for State and county taxes for the year 1888, the taxes for the State of California and for the county of San Bernardino, a large sum of money, to wit, the sum of $75; which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid.

And the said plaintiff further saith that, notwithstanding the assessment of said taxes and the notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the above sum last mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreements, redeemed the said premises from said taxes by payment of a large sum of money,
243 to wit, the sum of $150, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; by means whereof the said defendant became liable to pay to the said plaintiff the said sums of money last mentioned when he, said defendant, should be thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often so requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of $150.

And for that whereas also the said defendant heretofore, to wit, on the 16th day of June, A. D. 1887, entered into an agreement, under his hand and seal, dated April 15th, A. D. 1887, to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county of San Bernardino, State of California, described in said last-mentioned agreement, to wit, the northwest quarter of

lot 43 of the San Antonio tract, according to the map of said tract duly recorded in Book 3, page 7, of maps, records of San Bernardino, State of California, which said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff,
to pay and discharge all taxes and assessments and water
244 rates that might be levied or assessed during the pendency of this agreement for the sale of said above-described premises upon the premises therein and hereinbefore described, and in default of defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from date of such payment, at the rate of 1% per month; and said plaintiff further saith that thereafter, during the year A. D. 1888, there was assessed upon said last-described premises for State and county taxes for the year 1888, the taxes for the State of California and for the county of San Bernardino, a large sum of money, to wit, the sum of $75, which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further saith that, notwithstanding the assessment of said taxes and the notice to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said premises from said taxes by payment of a large sum of money, to wit, the sum of $150, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay to said plaintiff the said sum of
money last mentioned when he, the said defendant, should be
245 thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often so requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, the sum of $150.

And for that whereas also the said defendant heretofore, to wit, on the 16th day of June, A. D. 1887, entered into an agreement under his hand and seal, dated April 15th, 1887, to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county of San Bernardino, State of California, described in said

last-mentioned agreement, to wit, the southeast quarter of lot 43 of the San Antonio tract, according to the map of said tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, California, when said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff, to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of said agreement for the sale of said above-described premises upon the premises therein and hereinbefore described, and in default of the defendant so doing the said plaintiff might pay the same, and before the final payment of purchase-money the said defendant expressly agreed,
for the consideration aforesaid, to refund all amounts so paid,
246 with interest from date of such payment at the rate of 1 % per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 they were duly assessed upon said last-described premises for State and county taxes for the year 1888, to wit, the taxes for the State of California and for the county of San Bernardino, a large sum of money, to wit, the sum of $75, which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further saith that, notwithstanding the assessment of said taxes and the notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above mentioned, with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said premises from said taxes by payment of a large sum of money, to wit, the sum of $150, of all of which the said defendant had then and there full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money last mentioned when he, said defendant, should be thereunto afterwards requested, and, being so liable, he, said defendant, in consideration thereof, afterwards, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said
taxes last before specified when he, the said defendant, should
247 be thereunto afterwards requested, but, although often requested, hath neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of $150.

And for that whereas also the said defendant heretofore, to wit, on the 16th day of June, A. D. 1887, entered into an agreement, under his hand and seal, date- April 15th, 1887, to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county

of San Bernardino, State of California, described in said last-mentioned agreement, to wit, the southwest quarter of lot 43 of the San Antonio tract, according to map of said tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, State of California, which said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff, to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of said agreement for the sale of said above-described premises upon the premises therein and hereinbefore described, and in default of defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from date of such payment at the rate of 1% per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was duly assessed upon said last-described premises for
State and county taxes for the year 1888, to wit, the taxes for
248 the State of California and for the county of San Bernardino,
a large sum of money, to wit, $75, which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further saith that, notwithstanding the assessments of said taxes and the notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said premises from said taxes by payment of a large sum of money, to wit, the sum of $150, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money last mentioned when said defendant should be thereunto thereafterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, on the 19th day of August, A. D. 1889, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of $150.

And for that whereas also the said defendant heretofore, to wit,
on the 23rd day of June, A. D. 1887, entered into an agreement
249 under his hand and seal, dated April 15th, 1887, to and with
the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises

situated in San Bernardino county, State of California, described in said last-mentioned agreement, to wit, beginning at the northeast quarter of lot 34 of the San Antonio tract, thence southerly 759 & $\frac{75}{100}$ feet; thence westerly and parallel with Fifth avenue 660 & $\frac{25}{100}$ feet; thence northerly and parallel with Olive avenue 770 & $\frac{25}{100}$ feet to the right of way of the S. P. R. R. Company; thence easterly, following the south line of said right of way, 661 & $\frac{56}{100}$ feet to the point of beginning, containing 11 & $\frac{8}{10}$ acres, and being in the northeast corner of lot 34 of the San Antonio tract, according to the map of said tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, State of California, which said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of said agreement for the sale of said above-described premises upon the premises therein and hereinbefore described, and in default of the defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from date of such payment at the rate of 1 % per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was duly
assessed upon said last-described premises for State and
250 county taxes for the year 1888, to wit, the taxes for the State
of California and for the county of San Bernardino, a large sum of money, to wit, the sum of $25, which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further said that, notwithstanding the assessment of said taxes and the notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said taxes by payment of a large sum of money, to wit, the sum of $50, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money last mentioned when he, said defendant, should be thereunto afterwards requested, and, being so liable, he, said defendant, in consideration thereof, afterwards, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often so requested, hath neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of $50.

And for that whereas also the said defendant heretofore,
251 to wit, on the 23rd day of June, A. D. 1887, entered into an agreement, under his hand and seal, dated April 15th, 1887, A. D., to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county of San Bernardino, State of California, described in said last-mentioned agreement, to wit, beginning at the northwest corner of lot 34 of the San Antonio tract, thence easterly, following the south line of the right of way of the S. P. R. R., 661 & $\frac{65}{100}$ feet; thence southerly and parallel with Olive avenue 770 & $\frac{25}{100}$ feet; thence westerly and parallel with Fifth avenue 660 & $\frac{75}{100}$ feet; thence northerly, following the center line of Olive avenue, 744 & $\frac{75}{100}$ feet to the point of beginning, containing 11 & $\frac{5}{10}$ acres and being in the northwest corner of lot 34 of the San Antonio tract, according to the map of said tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, State of California, which said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of said agreement for the sale of said above-described premises upon the premises therein and hereinbefore described, and in default of defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from
252 date of such payment at the rate of 1 % per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was duly assessed upon said last-described premises for State and county taxes for the year 1888, to wit, the taxes for the State of California and for the county of San Bernardino, a large sum of money, to wit, the sum of $25, which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further saith that, notwithstanding the assessment of said taxes and the notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said premises from said taxes by paying a large sum of money, to wit, the sum of $50, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay the said plaintiff the said sum of money when he, said defendant, should be thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, on the

19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often
253 so requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, the sum of $50.

And for that whereas also the said defendant heretofore, to wit, on the 23rd day of June, A. D. 1887, entered into an agreement, under his hand and seal, dated April 15th, A. D. 1887, to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said last-mentioned — had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county of San Bernardino, State of California, described in said last-mentioned agreement, to wit, beginning at the southeast corner of lot 34 of the San Antonio tract, thence westerly, following the centre line of Fifth avenue, 660 & $\frac{75}{100}$ feet; thence northerly and parallel with Olive avenue 659 & $\frac{25}{100}$ feet; thence easterly and parallel with Fifth avenue 660 & $\frac{75}{100}$ feet; thence southerly 659 & $\frac{25}{100}$ feet to the point of beginning, containing 10 acres and being in the southeast corner of lot 34 of the San Antonio tract, according to the map of said tract duly recorded in Book 3, page 7, of maps, records of San Bernardino Co., State of California, which said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said *plaintiff to said* defendant and purchased by said defendant from said plaintiff to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of said agreement for the sale of said above-described premises upon the pr-mises therein and hereinbefore described, and in default of defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defend-
254 ant expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from date of such payment at the rate of 1% per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was duly assessed upon said last-described premises for State and county taxes for the year 1888, to wit, the taxes of the State of California and for the county of San Bernardino, a large sum of money, to wit, the sum of $25, which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and said plaintiff further saith that, notwithstanding the assessment of said taxes and the notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said premises from

said taxes by payment of a large sum of money, to wit, the sum of $50, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay the said plaintiff the sum of money last mentioned when he, the said defendant, should be thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said *said* plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often so requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, the sum of $50.

255

And for that whereas also the said defendant heretofore, to wit, on the 23rd day of June, A. D. 1887, entered into an agreement under his hand and seal, dated April 15th, A. D. 1887, to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the said defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county of San Bernardino, State of California, described in said last-mentioned agreement, to wit: Beginning at the southwest corner of lot 34 of the San Antonio tract, thence easterly, following the centre line of Fifth avenue, 660 & $\frac{75}{100}$ feet; thence northerly and parallel with Olive avenue 659 & $\frac{25}{100}$ feet; thence westerly and parallel with Fifth avenue 660 & $\frac{75}{100}$ feet; thence southerly, following the centre line of Olive avenue, 659 & $\frac{25}{100}$ feet to the point of beginning, containing ten acres and being in the southwest corner of lot 34 of the San Antonio tract, according to the map of said tract duly recorded in Book 3, page 7, of maps, records of San Bernardino county, State of California, which said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff, to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of said agreement for the sale of said above-described premises upon the premises therein and hereinbefore described, and in default of the defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant, expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from date of such payment at the rate of 1 % per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was duly assessed upon said last-described premises for State and county taxes for the year 1888, to wit, the taxes for the State of California and for the county of San Bernardino, a large sum of money, to wit, the sum of $25, which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further saith that, notwithstanding the

256

assessment of said taxes and the notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of *of* said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said premises from said taxes by payment of a large sum of money, to wit, the sum of $50, of all of which the said defendant then and there had full notice, to wit, at Pomona aforesaid, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money last mentioned when the said defendant should be thereafter requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the
257 sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of $50.

And for that whereas also the said defendant heretofore, to wit, on the 16th day of June, A. D. 1887, entered into an agreement under his hand and seal, dated April 25th, A. D. 1887, to and with the said plaintiff wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county of San Bernardino, State of California, described in said last-mentioned agreement, to wit, most easterly 20 acres of lot 36 of the San Antonio tract, according to the map of said tract duly recorded in Book 3, page 7, of maps, records of San Bernardino county, California, — said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff to pay and discharge all taxes, assessments, and water rates that might be levied or assessed during the pendency of this agreement for the sale of said above-described premises upon the premises therein and hereinbefore described, and in default of the defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was duly assessed
258 upon said last-described premises for State and county taxes for the year 1888, to wit, the taxes for the State of California and for the county of San Bernardino, a large sum of money, to wit, the sum of $40, which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at De-

troit aforesaid; and the said plaintiff further saith that, notwithstanding the assessment of said taxes and the notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay said sum last above mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said premises from said taxes by payment of a large sum of money, to wit, the sum of $80, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay the said plaintiff the said sum of money last mentioned when he, said defendant, should be thereunto afterwards requested, and, being so liable, he, said defendant, in consideration thereof, afterwards, to wit, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often so requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in
259 the sum of $80.

And for that whereas also the said defendant heretofore, to wit, on the 23rd day of April, A. D. 1887, entered into an agreement under his hand and seal, dated April 9th, 1887, to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county of Los Angeles, State of California, to wit, the southeast quarter of block 211 of the Pomona tract, according to map of said tract, duly recorded in Book 3, pages 96 and 97, of miscellaneous records of Los Angeles county, State of California, which said premises in and by said last-mentioned agreement are contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff, to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of this agreement for the sale of said above-described premises upon the premises therein and hereinbefore described, and in default of the defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was duly assessed upon said last-described premises for State and county taxes for the year 1888, to wit, the taxes for the State of California and for the county of Los Angeles, a large sum of money, to wit, the sum of $25, which said sum of money thereby became a lien upon
260 said premises herein last above described, of all of which the

said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further saith that, notwithstanding the assessment of said taxes and the notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed said premises from said taxes by payment of a large sum of money, to wit, the sum of fifty dollars, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money last mentioned when he, the said defendant, should be thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of fifty dollars.

And for that whereas also the said defendant heretofore, to wit, of the 25th day of April, A. D. 1887, entered into an agreement under his hand and seal, dated April 9th, A. D. 1887, to and with the said plaintiff, wherein and whereby he, *with* the said
261 defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the defendant that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county of Los Angeles, State of California, described in said last-mentioned agreement, to wit, block two hundred and nine (209) of the Pomona tract, duly recorded in Book Three, pages ninety-six and ninety-seven, of miscellaneous records of Los Angeles county, State of California, which said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff, to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of said agreement for the sale of the above-described premises upon the premises therein and hereinbefore described, and in default of the defendant's so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from the date of such payment at the rate of one per cent. per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was duly assessed upon said above-described premises for State and county taxes for the year 1888, to wit, the taxes for the State of California and for the county of Los Angeles, a large sum

of money, to wit, the sum of twenty-five dollars, which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further saith that, notwithstanding the assessment of said taxes
262 and the notice thereof to the said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of the said taxes, and that thereupon the said plaintiff, acting upon the terms of the said agreement, redeemed the said premises from said taxes by payment of a large sum of money, to wit, the sum of fifty dollars, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money last mentioned when he, said defendant, should be thereunto afterwards requested, and, being so liable, he, said defendant, in consideration thereof, afterwards, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often so requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of fifty dollars.

And for that whereas also the said defendant heretofore, to wit, on the 25th day of April, A. D. 1887, entered into an agreement under his hand and seal, dated April 9th, A. D. 1887, to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the said defendant that the said defendant might at once enter upon, occupy, and enjoy the
263 premises situated in county of Los Angeles, State of California, described in said last-mentioned agreement, to wit, the north half of block two hundred and ten (210) of the Pomona tract, according to a map of said tract, duly recorded in Book Three, pages ninety-six and ninety-seven, of miscellaneous records of Los Angeles county, California, which said premises in and by said last-mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff, to pay and discharge all taxes, assessments, and water rates that might be levied or assessed during the pendency of said agreement for the sale of the said above-described premises upon the premises therein and hereinbefore described, and in default of the defendant's so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agreed, for the consideration aforesaid, to refund all amounts so paid, with interest from date of said payment at the rate of one per cent. per month; and said plaintiff further saith that there-

after and during the year A. D. 1888 there was duly assessed upon said last-described premises for State and county taxes for the year 1888, to wit, the taxes for the State of California and for the county of Los Angeles a large sum of money, to wit, the sum of twenty-five dollars, which said sum of money thereby became a lien upon said premises herein last above described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further saith that, notwithstanding the assessment of said taxes and the notice thereof to said defendant, the said defendant, not regarding his promises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above men-
264 tioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said premises from said taxes by payment of a large sum of money, to wit, the sum of fifty dollars, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money last mentioned when he, said defendant, should be thereunto afterwards requested, and, being so liable, he, said defendant, in consideration thereof, afterwards, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often so requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of fifty dollars.

And for that whereas also the said defendant heretofore, to wit, on the 25th day of April, A. D. 1887, entered into an agreement under his hand and seal, dated April 9th, 1889, to and with the said plaintiff, wherein and whereby he, the said defendant, in consideration that the said plaintiff in said agreement last mentioned had agreed to and with the plaintiff that the said defendant might at once enter upon, occupy, and enjoy the premises situated in the county of Los Angeles, State of California, described in said last-mentioned agreement, to wit, south half (S. ½) of block 210 of the Pomona tract, according to map of said tract, duly recorded in Book 3, pages 96 and 97, of miscellaneous records of Los
265 Angeles county, California, which said premises in and by said mentioned agreement were contracted to be sold by said plaintiff to said defendant and purchased by said defendant from said plaintiff, to pay and discharge all taxes and assessments and water rates that might be levied or assessed during the pendency of said agreement for the sale of the said above-described premises upon the premises therein and hereinbefore described, and in default of the defendant so doing the said plaintiff might pay the same, and before the final payment of the purchase-money the said defendant expressly agreed, for the consideration aforesaid, to refund

all amounts so paid, with interest from date of such payment at the rate of one per cent. per month; and said plaintiff further saith that thereafter and during the year A. D. 1888 there was duly assessed upon said last-described premises for State and county taxes for the year 1888, to wit, the taxes for the State of California and county of Los Angeles, a large sum of money, to wit, the sum of twenty-five dollars, which said sum of money thereby became a lien upon said premises hereinabove last described, of all of which the said defendant had full notice, to wit, at Pomona, to wit, at Detroit aforesaid; and the said plaintiff further saith that, notwithstanding the assessments of said taxes and the notice thereof to said defendant, the said defendant, not regarding his premises in said agreement contained, neglected and refused for a long time thereafter to pay the said sum last above mentioned, together with such charges and interest as had thereon accrued, and to redeem the said premises out from under the lien of said taxes, and that thereupon the said plaintiff, acting upon the terms of said agreement, redeemed the said premises from said taxes by payment of a large sum of money, to
266 wit, the sum of fifty dollars, of all of which the said defendant then and there had full notice, to wit, at Pomona, to wit, at Detroit aforesaid, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money last mentioned when he, said defendant, should be thereunto afterwards requested, and, being so liable, he, the said defendant, in consideration thereof, afterwards, on the 19th day of August, A. D. 1889, at, to wit, Detroit aforesaid, undertook and then and there faithfully promised the said *defendant* to pay the sum of money so as aforesaid paid by said plaintiff in redemption of said taxes last before specified when he, the said defendant, should be thereunto afterwards requested, but, although often so requested, has neglected and refused so to do, to the plaintiff's damage in a large sum of money, to wit, in the sum of fifty dollars ($50).

And for that whereas also the said defendant, on the 19th day of August, A. D. 1889, at, to wit, Detroit, in said district, was indebted to the plaintiff in the sum of one hundred thousand dollars ($100,000) for the price and value of goods then and there sold and delivered by plaintiff to the defendant at his request, and in a like sum for the price and value of work then and there done and material for the same provided by plaintiff for the defendant at his request.

And in a like sum for money then and there lent by plaintiff to the defendant at his request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant at his request, and in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated be-
267 tween them.

And thereupon the said defendant afterwards and on the day and year and at the place aforesaid, in consideration of the premises respectively, then and there promised the said plaintiff to

pay it the said several last-mentioned moneys respectively on request; yet he has disregarded his promises and has not paid any of the said moneys or any part thereof, although often requested so to do, to the plaintiff's damage of one hundred thousand dollars ($100,000), and therefore it brings suit, &c.

HENRY M. DUFFIELD,
Plaintiff's Attorney.

Filed Sept. 26 as of Sept. 23, 1889, by order of court.
WALTER S. HARSHA, *Clerk.*

268 *Præcipe for Appearance of Defendant.*

Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

To the clerk of said court:

Please enter our appearance in this cause as attorneys of the defendant, Henry M. Loud.

HANCHETT, STARK & HANCHETT,
Attorneys for Defendant.

Filed Oct. 1st, 1889.
WALTER S. HARSHA, *Clerk.*

269 *Entry of Appearance.*

The Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

On filing præcipe in this court and on motion of Hanchett, Stark and Hanchett, att'ys for said defendant, it is ordered that the appearance of said defendant be, and the same is hereby, entered herein.

WALTER S. HARSHA, *Clerk.*

HANCHETT, STARK & HANCHETT,
Att'ys for Defendant.

270 *Proof of Service of Narr. and Bill of Particulars.*

In the Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD, Def't.

To Hanchett, Stark and Hanchett, att'ys for defendant.

GENTLEMEN: Take notice that the plaintiff makes no claim under the common counts in this case except for the several sums of money paid for State and county taxes for the year 1888 respectively set out in the special counts in the declaration, which said sums of money it will claim the right to recover under the common counts if for any reason they should not be recovered for under the said special counts.

Yours, etc.,
HENRY M. DUFFIELD,
Plaintiff's Att'y.

Dated Oct. 1st, 1889.

In the Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

STATE OF MICHIGAN, }
County of Wayne, } *ss:*

271 Orlando B. Willcox, Jr., being duly sworn, deposes and says that he is a resident of the State of Michigan and county of Wayne and clerk to Henry M. Duffield, attorney for plaintiff in this cause; that on the first day of October, A. D. 1889, he served a true copy of the declaration filed in this cause upon Hanchett, Stark and Hanchett, attorneys for defendant in said cause, together with a bill of the particulars of said plaintiff's cause of action therein, a true copy of which is hereto attached, by the delivering the same to Benton Hanchett, a member of the firm of defendant's attorneys, in their office, in the city of Saginaw, in said State.

ORLANDO B. WILCOX, JR.

Subscribed and sworn to before me this 3rd day of October, 1889.

JNO. F. McKINLAY,
Notary Public, Wayne County, Mich.

Filed Oct. 3rd, 1889.

WALTER S. HARSHA, *Clerk.*

272 *Proof of Service of Declaration.*

In the Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY, Plaintiff,
vs.
HENRY M. LOUD, Defendant.

STATE OF MICHIGAN,
Eastern District of Michigan, County of Wayne, } *ss:*

Orlando B. Willcox, being duly sworn, deposes and says that on the first day of October, A. D. 1889, he served a copy of the declaration filed in this cause, which he had himself compared with said original on file, upon the attorneys for the defendant by delivering the same to Benton Hanchett, Esq., at the office of Hanchett, Stark & Hanchett, at Saginaw, in said State of Michigan, between the hours of four and five o'clock in the afternoon of said day.

And further deponent saith not.

ORLANDO B. WILLCOX, JR.

Subscribed and sworn to before me this 4th day of October, A. D. 1889.

JNO. F. McKINLAY,
Notary Public, Wayne Co., Mich.

Filed Oct. 4th, 1889.

WALTER S. HARSHA, *Clerk.*

273 *Proof of Service of Bill of Particulars.*

In the Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD, Def't.

To Hanchett, Stark and Hanchett, att'ys for defendant.

GENTLEMEN: Take notice that the plaintiff makes no claim under the common counts in this cause except for the several sums of money paid for State and county taxes for the year 1888 respectively set out in the special counts in the declaration, which said sums of money it will claim the right to recover under the common counts if for any reason they should not be recovered for under the said special counts.

Yours, etc.,

HENRY M. DUFFIELD,
Plaintiff's Att'y.

Dated Oct. 1st, 1889.

In the Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY, Plaintiff,
vs.
HENRY M. LOUD, Defendant.

274 STATE OF MICHIGAN,
Eastern District of Michigan, County of Wayne.

Orlando B. Willcox, being duly sworn, deposes and says that on the first day of October, A. D. 1889, he served a bill of particulars, of which the annexed is a true copy, upon the attorneys for the defendant by delivering the same to Benton Hanchett, Esq., at the office of Hanchett, Stark & Hanchett, at Saginaw, in said State of Michigan, between the hours of four and five o'clock in the afternoon of said day.

And further deponent saith not.

ORLANDO B. WILLCOX.

Subscribed and sworn to before me this 4th day of October, A. D. 1889.

JNO. F. McKINLAY,
Notary Public, Wayne Co., Mich.

Filed Oct. 4th, 1889.

WALTER S. HARSHA, *Clerk.*

275 *Demurrer.*

The Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

The said defendant, by Hanchett, Stark & Hanchett, his attorneys, says that the 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, and 63rd counts of the plaintiff's declaration are not sufficient in law and each of them is not sufficient in law, and he demurs thereto, and for causes of demurrer to each of said counts says:

1st. That it is not alleged and it does not appear that the taxes on account of which recovery is sought by such count were assessed or levied during the pendency of the agreement referred to in the count for the sale of the land described in the count.

2nd. That it is not alleged and it does not appear that the plaintiff redeemed the premises described in the count from said taxes by payment therefor before the final payment of the purchase-money for said land.

HANCHETT, STARK & HANCHETT,
Def't's Attorney-.

Filed Oct. 21st, 1889.

WALTER S. HARSHA, *Clerk.*

276 *Joinder in Demurrer.*

In the Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY, Plaintiff,
vs.
HENRY M. LOUD, Def't.

And the said plaintiff, by Henry M. Duffield, by its attorney, says that the 50th, 51st, 52nd, 53-, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, and 63rd counts in its said declaration are sufficient in law.

HENRY M. DUFFIELD,
Att'y for Pl'ff.

Dated Nov. 10th, 1889.

Filed Nov. 11th, 1889.

WALTER S. HARSHA, *Clerk.*

277 *Stipulation.*

In the Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY, Plaintiff,
vs.
HENRY M. LOUD, Defendant.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that no objections shall be taken to the depositions heretofore or hereafter to be taken in this cause on behalf of either of the parties because the same are taken during the session of the jury or a jury term of this court; that all objections to the sufficiency or reasonableness of the notice of the taking of any depositions heretofore or on the date hereof taken or noticed to be taken are hereby waived by the respective parties.

That the demurrer of the defendant in this cause to the 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, and 63rd counts of the plaintiff's declaration may be sustained and a judgment entered thereon; that the said counts are not sufficient in law, and that the cause shall stand for trial on the remaining counts of the plaintiff's declaration only.

Dated Feb'y 27th, 1890.

HENRY M. DUFFIELD, *Att'y for Pl'ff.*
HANCHETT, STARK & HANCHETT,
Def't's Att'ys.

Filed Feb'y 27th, 1890.

WALTER S. HARSHA, *Clerk.*

278 *Order Sustaining Demurrer, &c.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the twenty-seventh day of February, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD. } No. 7739.

On reading and filing stipulation, signed by attorneys for respective parties, it is ordered that the demurrer of the defendant in this cause to the 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, and 63rd counts of the plaintiff's declaration be, and the same is hereby, sustained and judgment for the defendant thereon is hereby entered; and it is further ordered that the cause stand for trial on the remaining counts of the plaintiff's declaration only.

279 *Trial.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the first day of May, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD. } No. 7739.

The parties in this cause being in court, by their respective attorneys, ready for trial, thereupon comes a jury, namely, Louis La Fontaine, Alfred M. Soules, Frank A. Beaubien, Henry W. Rolason, Adam Bailey, Alexander Lobban, Albert Graves, Frank C. Choate, Herbert J. Greene, Stephen Long, Charles M. Fay, and Robert Ashley, good and lawful men, who, being duly impaneled, tried, and sworn well and truly to try the issue between the parties, sit together and hear a portion of the evidence in the case.

280 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Friday, the second day of May, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD. } No. 7739.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear further evidence.

281 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the third day of May, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD. } No. 7739.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear further evidence.

282 *Verdict.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the fifth day of May, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD. } No. 7739.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together, and, after hearing the conclusion of the evidence in the case, under the instructions of the court, without leaving their seats, say that the said defendant did undertake and promise in manner and form as the said plaintiff hath in its declaration in this cause complained against him, and they assess the damages of the said plaintiff on occasion of the promises at the sum of seventy-nine thousand eight hundred and nineteen dollars and thirty cents.

On motion of Benton Hanchett, of counsel for defendant, it is ordered that said defendant be allowed 10 days in which to move for a new trial, and that in the meantime all proceedings in said cause be stayed.

283 *Motion for New Trial.*

Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

Now comes the said defendant, by Hanchett, Stark & Hanchett, his attorneys, and moves the court to set aside the verdict of the jury rendered in said cause and to grant a new trial therein for the following reasons and upon the following grounds:

1st. Because the court erred in overruling the motion of the defendant made at the close of the plaintiff's case that a nonsuit be entered against the plaintiff.

2nd. Because the court erred in refusing to admit in evidence the several certified copies of deeds executed by the plaintiff to different parties conveying water rights in the Del Monte Irrigation Company, the Palomares Irrigation Company, and the Irrigation Company of Pomona, offered by the defendant to show conveyances by the plaintiff of water rights in said irrigation companies.

3rd. Because the court erred in refusing to admit in evidence the deed made by the plaintiff to Charles W. Brown.

4th. Because the court erred in refusing to permit the defendant to testify to the representations made to him by O. F. Giffin to induce the defendant to make the purchases and accept the contracts sued upon.

5th. Because the court erred in striking out the testimony of the defendant tending to show that the defendant did no acts on
284 lot eleven in the northeast Pomona tract since the fall of 1888, and that said lot had remained vacant and not in his possession since the fall of 1888.

6th. Because the court erred in not admitting in evidence the certified copy of the patent from the United States to Henry Dalton, Ignacio Palomares, and Ricardo Vegar, and in ruling the same out of the case as evidence.

7th. Because the court erred in refusing to charge the jury as requested in each of the several requests to charge preferred by the defendant.

This applies to each of said several requests taken separate from the others.

8th. Because the court erred in charging and directing the jury to render a verdict for the plaintiff.

Said motion is based upon the files and records in said cause and upon the rulings of said court made upon the trial thereof.

HANCHETT, STARK & HANCHETT,
Def't's Attorneys.

Dated May 9th, 1890.

Filed May 9th, 1890.

WALTER S. HARSHA, *Clerk.*

285 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Friday, the sixth day of June, in the year one thousand eight hundred and ninety.

Present: The Honorable David J. Brewer, associate justice Supreme Court, and the Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY *vs.* HENRY M. LOUD. } Before Full Bench. No. 7739.

In this cause a motion by defendant for a new trial is argued in part.

286 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the seventh day of June, in the year one thousand eight hundred and ninety.

Present: The Honorable David J. Brewer, associate justice of Supreme Court, and the Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY *vs.* HENRY M. LOUD. } No. 7739.

Before full bench.

In this cause the court hears the conclusion of the arguments of counsel upon defendant's motion for a new trial, and thereupon said matter is submitted.

287 *Judgment.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the fourteenth day of June, in the year one thousand eight hundred and ninety.

Present: The Honorable David J. Brewer, associate justice of Supreme Court, and the Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY *vs.* HENRY M. LOUD. } No. 7739.

Before full bench.

In this cause a motion by the defendant for a new trial having been heretofore argued by counsel and submitted, and due deliberation having been thereupon had, said motion is by the court now here denied; and the jury by whom the issue was tried having, on

the 5th day of May, 1890, rendered a verdict in favor of said plaintiff and against said defendant for $79,819.30 damages, now, on motion of Mr. Henry M. Duffield, attorney for said plaintiff, it is considered that the said plaintiff do recover against the said defendant its damages aforesaid, with interest thereon to this day at the rate of eight per cent. per annum, amounting in all to the sum of eighty thousand five hundred and eleven dollars and seven cents, and also its costs and charges by it about its suit in this behalf expended, to be taxed, and that said plaintiff have execution therefor, but said execution shall not issue until thirty days after the plaintiff has deposited with the clerk of this court for the benefit of the
288 vendee all the deeds to the land and certificates of stock, so that defendants may have an opportunity of examining the same to see that the titles are perfect and the transfers of stock are made in accordance with the laws of the State of California. If writ of error is sued out the penal amount of bond is hereby fixed at $125,000.00.

289 *Stipulation.*

Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

In this cause it is hereby stipulated that an order may be entered extending time to settle bill of exceptions to July 17th, 1890, inclusive, and that the bill of exceptions may be presented for settlement and signature at any time on or before said date upon four (4) days' notice, although a writ of error may have in the meantime been issued and lodged.

Dated July 5th, 1890.

HENRY M. DUFFIELD, *Att'y for Pl'ff.*
HANCHETT, STARK & HANCHETT,
Att'ys for Def't.

Filed July 5th, 1890.

WALTER S. HARSHA, *Clerk.*

290 *Order Extending Time to Settle Bill of Exceptions.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the fifth day of July, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD. } No. 7739.

In this cause on reading and filing stipulation it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended until the 17th instant.

291 *Stipulation for Extension of Time to Settle B. of X.*

Circuit Court of the United States for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD. }

In this cause defendant have duly prepared and served his bill of exceptions in this cause to accom-odate said plaintiff's attorney, and at his request it is hereby stipulated that the time within which the said bill may be settled and signed is hereby extended ten days, and that an order so extending said time may be entered by the court in this cause without further notice.

HENRY M. DUFFIELD,
Plaintiff's Attorney.
HANCHETT, STARK & HANCHETT,
Defendant's Attorney.

Dated July 16th, 1890.

Filed July 16th, 1890.

WALTER S. HARSHA, *Clerk.*

292 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the sixteenth day of July, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD. } No. 7739.

By consent, the time to settle a bill of exceptions is hereby extended ten days. Said bill is now set for settlement Saturday, July 19th, at 2 o'clock p. m.

293 *Stipulation Extending Time to Settle B. of X.*

Circuit Court of the United States, Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

In this matter, to further accommodate plaintiff's counsel and to enable him to obtain certain papers from California desired by him in settling bill of exceptions and in relation to his amendments thereto, it is stipulated and agreed that the time for settling the bill of exceptions be extended to and including August 8th, 1890, and that an order may be entered to that effect. The hearing upon the proposed bill of exceptions is also to be adjourned to said August 8th, 1890, at 2 o'clock p. m., at the office of Honorable Henry B. Brown, unless by agreement a hearing is had at an earlier date.

Dated July 21st, A. D. 1890.

HENRY M. DUFFIELD, *Pl'ff's Att'y.*
HANCHETT, STARK & HANCHETT,
Def't's Att'y.

Filed July 21st, 1890.

WALTER S. HARSHA, *Clerk.*

294 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the twenty-first day of July, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD. } No. 7739.

On filing stipulation it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended until August 8th next.

295 *Stipulation.*

STATE OF MICHIGAN:

United States Circuit Court for the Eastern District of Michigan.

POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

In this cause it is further stipulated that the time to settle a bill of exceptions be extended to Monday, the 25th of August, 1890,

at 2 p. m., and that an order to that effect may be entered upon the filing hereof.

HENRY M. DUFFIELD, *Att'y for Plaintiff.*
HANCHETT, STARK & HANCHETT,
Att'y- for Def't.

Aug. 8th, 1890.

Filed Aug. 8th, 1890.

WALTER S. HARSHA, *Clerk.*

296 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Friday, the eighth day of August, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

POMONA LAND & WATER COMPANY
vs.
HENRY M. LOUD *et al.* } No. 7739.

On filing a stipulation it is ordered that the time to settle a bill of exceptions herein be, and the same is hereby, extended until Monday, the 25th day of August, 1890, at 2 p. m.

297 *Bill of Exceptions.*

Circuit Court of the United States for the Eastern District of Michigan.

THE POMONA LAND AND WATER COMPANY, Plaintiff,
vs.
HENRY M. LOUD, Defendant. } No. 7739.

At a session of said court held at the court-room, in the city of Detroit, on the 1st day of May, 1890, the issue joined in this cause came on to be tried before a jury impaneled and sworn, and upon the trial thereof evidence was given in behalf of the plaintiff as follows:

Frank L. Palmer, a witness produced and sworn in behalf of the plaintiff, testified that he resided in Pomona, California, and was secretary and treasurer of the plaintiff; that he knew defendant; that he had with him the contracts between the plaintiff and defendant for the purchase of some land, and he produced them. Defendant admitted the execution of said contracts by the parties thereto. Plaintiff thereupon offered in evidence twenty land contracts, copies of which are correctly set forth in the first twenty counts of plaintiff's declaration, to which copies reference is made as a part hereof for the terms of said contracts, and being the land contracts upon which the first forty counts in said declaration are predicated, and also offered in evidence nine applications to purchase lands, copies of which said nine applications are hereto annexed,

marked Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 9, being the contracts upon which the 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, and 49th counts of plaintiff's declaration are predicated.

298 Defendant objected to the introduction of all of said contracts and applications for the following reasons: 1st, that there is a variance from the contracts sued upon, and they therefore are not entitled to be admitted in evidence; 2nd, that the forty-ninth count describes a contract which is an agreement or application for the purchase of land with the usual water rights, while the contract offered in evidence is for land without any water rights; 3rd, that the contract described in the forty-ninth count never had any force—that is, the first payment was not made. Plaintiff's counsel then stated that he expected to prove that the defendant took possession of the land described in the forty-ninth count, paid taxes thereon, laid out roads and put up street signs and cleared the same.

Counsel for plaintiff asks leave of the court to amend the forty-ninth count of the declaration by striking out "usual water rights."

Motion is granted by the court, and thereupon the amendment to the declaration is made in open court and defendant's objections overruled and contracts and applications admitted in evidence.

Defendant excepted.

Permission was given to recall witness to testify as to the amount due plaintiff after he makes a computation.

Plaintiff also offered in evidence the testimony of JOHN A. WOY in behalf of plaintiff as follows:

My age is 32; my business has been for the last year looking after Eastern men's property in California; I reside in Pomona, California; I got acquainted with Mr. Loud when he first came here, but did not begin working for him until the spring of

299 1887; in the spring of 1887, I went to work for him about April 9th. I worked for about three months with a force of men consisting of about ten men, besides the teamsters had from two to four teams most of the time. Labored gathering the rocks off from lands and gathering stone off from graded roads and also filling up waste and did some plowing and put up signs; had some street signs made with names with different streets, also signs for Live Oak park. I put them at places Mr. Loud named. The parcels of land on which I worked was lot eleven over near the county line and adjoining lots. Mr. Loud was present nearly every day. I worked for him sometimes twice or three times a day; also when present he would take me and show me different locations where to work.

Q. Was there any portion of the land that he especially expressed an opinion about?

A. Yes, sir.

Q. What land was that?

A. That was in block eleven (11).

Q. The question was did he call any part of these lands Live Oak park?

A. Yes, sir.

Q. Will you state what lands he called Live Oak park?

A. Consisting of lots 23, 24, 20, 19, 17, and 11, that consists of Live Oak park.

Q. What work did you or your men ever do for Mr. Loud in block eleven (11), in the northeast Pomona tract?

A. I done some plowing, leveling, gathering stone off of it.

Q. On what part of the lot did you perform that labor?

A. All over it.

300 Q. Was there an avenue or street laid out by Mr. Loud along the west line north and south of lot eleven (11) of the northeast Pomona tract, extending thence south between lots 16 and 17, 19 and 20, 23 and 24?

A. There was.

Mr. Loud showed me on lot eleven where he was going to make a home. Payment for labor and time was made me by Mr. Loud every Saturday night.

Plaintiff rested, but reserving the rights to prove the computation of the amount due and evidence of the title in the plaintiff, should the court consider it necessary for plaintiff to prove title, and the cost of bringing water to the premises described in the forty-ninth count.

Defendant moved that plaintiff nonsuited in the case for the reason that plaintiff had not made a case and had not shown any tender of performance upon its part or ability to perform upon its part the contracts sued upon. Motion overruled. Defendant excepted, and thereupon the defendant's counsel opened the case on the part of the defendant to the jury, and in said opening stated, among other things, that defendant claimed that the contract between plaintiff and the defendant called for a particular kind of water stock, which would represent a right or title to the quantity of water described, the same as his title to the land, and that he understood that he was to get shares of stock in the several irrigation companies which were a title to so much water, but that the only shares of stock which plaintiff had to give him did not represent any title to any water, and in said opening the defendant's counsel nowhere asserted or stated any expectation of proving that the plaintiff did not have good title to the lands contracted

301 to be sold and said opening contained no intimation that such defence would be relied on.

Defendant offered in evidence the articles of incorporation of the Pomona Land and Water Company. Objected to as immaterial by plaintiff's counsel.

Received in evidence. A copy of the same is hereto annexed, marked Exhibit 11.

Defendant also offered in evidence the articles of association of the Irrigation Company of Pomona.

Objected to as irrelevant and immaterial. Objection overruled.

Paper received in evidence, a copy of which is hereto annexed, marked Exhibit 12.

Defendant also offered in evidence the articles of association of the Del Monte Irrigation Company.

Objected *as* as irrelevant and immaterial. Objection overruled. Paper received in evidence. A copy of it is hereto annexed, marked Exhibit 13.

Defendant also offered in evidence the articles of association of the Palomares Irrigation Company.

Objected to by plaintiff's counsel as irrelevant and immaterial. Objection overruled. Paper received in evidence, a copy of which is hereto annexed, marked Exhibit 14.

Defendant offered in evidence the by-laws of the Irrigation Company of Pomona. Paper received in evidence. A copy thereof is hereto annexed, marked Exhibit 15.

Defendant offered in evidence the by-laws of the Del Monte Irrigation Company; received in evidence, a copy of which is hereto annexed, marked Exhibit 16.

Defendant offered in evidence the by-laws of the Palomares Irrigation Company. Paper received in evidence. A copy thereof is hereto annexed, marked Exhibit 17.

302 FRANK L. PALMER was recalled as a witness in behalf of defendant and testified: I am a director of the Pomona Land and Water Company. The directors of that company are B. S. Nichols, H. A. Palmer, H. J. Nichols, myself, and Frank Hinkley. B. S. Nichols is president of the company; I am secretary and treasurer; B. S. Nichols is manager; H. J. Nichols, son of the president, is superintendent; H. A. Palmer is vice-president. I am secretary and treasurer, also director, of the Del Monte Irrigation Company. The other directors are B. S. Nichols, H. A. Palmer, H. J. Nichols, and J. P. Storrs. B. S. Nichols is president and H. A. Palmer is vice-president; H. J. Nichols is superintendent. I am secretary and treasurer and also director of the Palomares Irrigation Company. The directors are the same as in the Del Monte Irrigation Company—H. A. Palmer, president; B. S. Nichols, vice-president, and H. J. Nichols, superintendent. I am secretary and treasurer of the Irrigation Company of Pomona. The other directors of that company are Samuel T. Alexander, B. S. Nichols, H. A. Palmer, and H. J. Nichols. B. S. Nichols is president; H. A. Palmer, vice-president. H. J. Nichols acts as superintendent.

No part of the five thousand dollars of the capital stock subscribed in each of the three irrigation companies has been paid in, and, as I understand it, no other stock has been subscribed in either of the three irrigation companies than that which appears on the articles of incorporation, and no stock has been paid in. I have been secretary of the plaintiff since May, 1887, and held the office of treasurer since July, 1883. Its business offices are in Pomona. It was engaged in selling lands and sold water rights with the lands. The need for irrigating the land depends very much on the char-
303 acter of the soil. There are some lands that do not require

any water at all. The great majority of our valley lands require water, and water is especially required for fruit-raising. The plaintiff was engaged from 1883 down to the spring of 1887 in selling lands with water rights at Pomona. The customary amount of water represented by a water right was an amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of the aperture to the surface of the water, or what is known in California as a miner's inch, to each ten acres of land.

The plaintiff company delivered the water up to the time of the formation of the irrigation companies—it delivered water until February, 1887—and had wells, pipes lines, flumes, and ditches for that purpose.

Witness'es attention is called to a map or paper and states that there was a paper gotten up by the Pomona Land and Water Company from that plat, and the same plat was afterwards used by agents who published that map at their own expense; that papers of which the paper exhibited is a copy were circulated not by the officers of the company, but by Thomas & Easton, who held a contract under which the lands were sold at that time, and their agent was O. F. Giffin. I mean Thomas & Easton were selling lands for the plaintiff there in 1887. Prior to the date there were several different agents; the one immediately prior was Frank A. Miller. A circular like the one shown me had been used in making sales of lands and water rights with lands about a month or six weeks prior to the sales to Mr. Loud. I think they began to be used about February, 1887. The sales agents had a separate part of the room occupied by the plaintiff and had charge of the circulars. How much they circulated I cannot testify
304 of my own knowledge. The sales agents occupied a part of the office-room of the plaintiff at Pomona, and these papers were stowed away under the counter in Thomas & Easton's part of the room, and, if circulated at all, went out from that room. Mr. Giffin had his office, as described, and represented Thomas & Easton, and he had his office in the front part of the room occupied by the Pomona Land and Water Company, separated from it by a counter and railing. I occupied the same room as secretary and treasurer, and it was in the office where the president and superintendent and manager of the company came to transact the business of the company. These circulars were issued and circulated by O. F. Giffin, if issued at all. I presume people came to the office and got them. I have no knowledge of it. I don't know, but I presume they were there for that purpose—for the purpose of being circulated—and if they got out to the public they got out by being sent out from that room. I think I have seen copies of this map circular outside of the office. I have seen various people have them Mr. Giffin began acting as sales agent of the lands about January. 1887.

Q. His business was to negotiate with purchasers for the sale of the land and water, was it not, to carry on the negotiations?

A. Yes, sir; Giffin was agent for Thomas & Easton.

Q. I am asking you now what he actually did.
A. He didn't take instructions from the Pomona Co.
Q. I am asking you if he did the actual work of negotiating sales.
A. I presume so.
Q. Don't you know so?
A. I think so.

305 Q. That you understand to be the fact?

A. That I understand to be the fact. After negotiations *ahd* been made by him, so that he obtained a purchaser, the written paper called an application was filled up by Mr. Giffin in his department. After those were signed and a deposit made they were passed over to the plaintiff and the contracts were prepared in our office. The twenty contracts issued to Mr. Loud were issued in that way. After I became secretary I either drew the contracts or had them drawn under my direction, and the contracts finally went into the hands of the purchaser with whom Mr. Giffin had negotiated. The contracts were made on blanks provided by the plaintiff, and were fil-ed out in plaintiff's office and signed by the plaintiff and presented to the purchaser for his signature. Mr. Giffin's general work is to secure purchasers, negotiating sales, and the sales negotiated by him were finally carried into contracts in the manner I have described, and he had his office in the same room with us. As you entered the office the first person you would meet, the person nearest the door, was O. F. Giffin. A large counter extends way across the room, with a gate, so that parties entering the room occupied by the plaintiff had to pass through a gate. My desk was back of the gate. The next person to Mr. Giffin would be myself. Further back, on the other side of the room, was the desk of the president. The sign over the room was Pomona Land and Water Company on one side, and on the other side, on the window, the sales agent had a sign.

The map and circular shown the witness and referred to by him was offered in evidence, together with the printed matter on the back thereof, and the same were received in evidence. A copy of the same is hereto annexed, marked Exhibit 18.

306 Defendant also offers in evidence a deed dated September 15th, 1884, from plaintiff to Chas. W. Brown, and certified copies of a number of other deeds executed by plaintiff and delivered to other parties, for the purpose of showing, among other things, what was understood to be water rights and water stock, what the plaintiff understood and gave out to be understood constituted water rights and water stock.

Plaintiff's counsel objected to the same as incompetent, and the court sustained the objection. It was admitted that this deed did not cover any of the land contracted to be sold to the defendant. Defendant excepted to the ruling.

Hereto annexed, marked Exhibit 19, is a copy of said deed to Charles W. Brown, and hereto annexed, marked Exhibit 20, is a list of the other deeds offered in evidence, showing date, the grantee, the lands conveyed, and the water right conveyed, all of said deeds

mentioned in said list being the same general form as said Charles W. Brown's deed, and all certified as indicated in said exhibit. It was admitted by defendant's counsel that none of said deeds covered any of the lands contracted to be sold by plaintiff to defendant.

Witness continues: F. McPherson was the agent sent to Pomona by Thomas & Easton to succeed O. F. Giffin and occupied the same place that O. F. Giffin had occupied, doing the same work. I know what is called the San Jose ranche, and the lands in question in this case, which lie in the county of Los Angeles, are a part of the San Jose ranche.

On cross-examination witness testified: Some of these lands in the Loud contracts lie in San Bernardino county. The head office of the Pomona Land and Water Company, prior to the time when Dr. Nichols became president, was in San Francisco. Dr. Nichols
307 became president early in 1887. Mr. H. A. Palmer preceded him as president, and some of the contracts which I refer to were signed by him. During Mr. Palmer's presidency the principal office was in San Francisco, something over five hundred miles from Pomona. Thomas & Easton were also in the firm of Easton & Eldridge. Thomas & Easton's authority was in writing; I have it with me at the hotel. In regard to the Irrigation Company of Pomona, I have a deed in my possession, in my custody, from the plaintiff to the Irrigation Company of Pomona.

Witness continues: The paper now shown me is signed by myself, as secretary of the Irrigation Company of Pomona, and by H. A. Palmer, former president of the company.

Paper referred to by witness is offered in evidence by plaintiff's attorney and objected to as immaterial.

And thereupon the following colloquy took place between the court and counsel:

The COURT (to defendant's counsel): Is your position here that under this form of organization it is impossible for this company to perform that contract (referring to stipulation in the contract for the delivery of shares of stock representing so much water)?

Mr. HANCHETT: Yes.

The COURT: Or that as a matter of fact there was not four inches of water there?

Mr. HANCHETT: No; but there is no provision by which the stock of this company represents water.

The COURT: That under the organization and law the shares of stock cannot represent water?

Mr. HANCHETT: Yes.

Mr. DUFFIELD: I will ask your honor to remember that we are discussing the objection which my brother makes to my offer to show the consideration which the Pomona Land Company gave for the stock which was issued to them.

The COURT: Do you propose to show as a matter of fact
308 that that quantity of water was attached to the land by that purchase?

Mr. DUFFIELD: Yes, your honor, if it should become necessary, I wil show that more than that amount of water was attached.

Objection overruled. Defendant excepted.

A copy of the paper referred to is hereto attached, marked Exhibit 21. Plaintiff's counsel also offered in evidence the deed of the one hundred and fifty-one inches of water referred to in the contract; to which defendant's counsel objected as immaterial, and the offer was withdrawn.

Witness continues:

Question to witness. You stated the amount of the capital stock of the Pomona Irrigation Company this morning. Will you state the amount of stock actually issued by the Pomona Irrigation Company up to the date of Mr. Loud's contracts?

Objected to as incompetent and immaterial.

The COURT: I think it is proper.

Defendant excepted.

There was issued or had been issued at the time of Mr. Loud's purchase 15,100 shares before any shares were issued on the Loud purchase.

Q. The same question with reference to the Del Monte Irrigation Company.

Objected to by defendant as immaterial and incompetent.

The COURT: I think it is proper.

Defendant excepted.

A. Twenty-one thousand shares, and in the Palomares Irrigation Company six thousand shares.

Q. How much water does a share of stock represent?

309 Objected to as incompetent. It must be shown by the articles of association, by-laws, or written instrument in some way. It cannot be shown by oral testimony.

The COURT: I think it is proper.

Defendant excepted.

A. One hundred shares of stock represents one inch of water, and that is true of each company.

Q. I will ask you, Mr. Palmer, whether there were any shareholders in the Pomona Company who were not land-owners, who were not of land appurtenant to this irrigation system.

Objected to as incompetent.

The COURT: I think it is proper.

Defendant excepted.

A. There are no stockholders of the Irrigation Company of Pomona holding any stock in that company except those who have bought land of the Pomona Land and Water Company, with the exception that one share of such stock is held by each of the directors to give them the right to be directors. In the Del Monte Company, of the stock issued, thirteen thousand six hundred shares are held by the San Francisco Savings Union as mortgagee of certain lands of the plaintiff. There were one hundred shares of stock held by each of the directors, and the rest of the stock issued is held by persons who have bought land from the Pomona Land and Water Company. In reference to the Palomares Irrigation Company, one hundred shares are held by each of the directors, and the rest of it is held by persons who have bought from the Pomona Land and Water Company. I hold stock as trustee in all of the irrigation companies, as provided by the deeds to the various irrigation companies, the Pomona Land and Water Company. Its trustees are entitled to receive one hundred shares of stock for each inch
310 of water delivered. I treated myself as though I were the plaintiff company, it being their stock and I holding it as trustee.

Q. Was any of this stock issued to Mr. Loud issued in his name?

Objected to as immaterial.

The COURT: I think it is proper.

Defendant excepted.

A. The company issued the stock called for by deeds and it was taken off of the company's stock and transferred to him.

PLAINTIFF'S ATTORNEY: I do not contend that it was delivered to him—simply issued in his name, ready to be delivered to him.

Witness continues: In the Irrigation Company of Pomona there was four hundred twenty-eight shares transferred to Henry M. Loud.

Shares produced and offered in evidence by plaintiff's attorney.

Objected to as immaterial.

The COURT: I think it is proper.

Defendant excepted.

Q. What was the purpose of their issue? Who directed you to issue them?

Objected to as immaterial.

The COURT: I think it is proper.

Defendant excepted.

A. It is my recollection that the directors instructed me to prepare them.

Plaintiffs produced the secretary's book of minutes of the Pomona Land and Water Company, which was identified by the witness, and a resolution therein dated July 24th, 1889, directing the issue or

transfer of the stock testified to by the witness to Mr. Loud was offered in evidence; to which introduction the defendant, by his counsel, objected and the same was not admitted.

311 The certificates for four hundred twenty-eight shares of stock, received in evidence, hereto annexed, marked Exhibit 22, is a copy of one of the certificates of stock so offered, all of the certificates being in the same form and of the same date.

The Pomona Irrigation Company has developed more water since the date it issued the fifteen thousand one hundred shares. I have been to the cienegas of the Irrigation Company of Pomona in the district known as the Palomares and have been to the wells in that district. They are flowing artesian wells. There were nearly one hundred altogether. How many there are in the district I do not know. There are one hundred wells in the three systems. I know but little with reference to the systems of irrigation. I am the office man and have charge of the office, but of course know more or less about the lands and those matters. The manager or superintendent would *me* more likely to know the written contract with Thomas & Easton, and am acquainted with the signature of the gentlemen who executed it in behalf of the plaintiff. They were at the time the officers they represent themselves to be there, and I have no doubt that the signature of Thomas & Easton is their signature.

Plaintiff's attorney offers in evidence the contract between Thomas & Easton and the Pomona Land and Water Company appointing them agents.

Defendant's attorney objected to the contract as immaterial.

The COURT: I think it is proper.

Defendant excepted.

Paper received in evidence; a copy thereof is hereto annexed, marked Exhibit 23.

Witness continues: In the Del Monte Irrigation Company
312 there were two thousand eight hundred seventy-nine & $\frac{1}{10}$ shares issued to Henry M. Loud and twelve hundred thirty-four shares of the Palomares Irrigation Company.

Plaintiff's attorney offered the certificates of the Del Monte Irrigation Company in evidence.

Defendant's counsel objected to the same as immaterial.

Plaintiff's counsel offers in evidence the shares of stock issued to Henry M. Loud in the Palomares Irrigation Company.

Defendant's counsel objects to the same as immaterial.

The same were admitted in evidence by the court.

Defendant excepted.

A copy of one of the certificates issued in the Del Monte Irrigation Company and one of the certificates issued in the Palomares Irrigation Company, offered in evidence, is hereto annexed, marked Exhibits 24 and 25.

The remainder of the certificates being in the same form and of

the same date, but for different amounts, corresponding, respectively, with the amounts named in the several contracts.

On redirect examination witness testifies: In the summer time the lands need most irrigation. They begin in April and continue through July, to the 1st of July. As to the bulk of the lands, they need more irrigation in June and July, I guess, than in the earlier and later months. In regard to the several issues of stock in the irrigation companies to Henry M. Loud, nothing *a*else has been done in relation to the certificates except to make them out, and I here exhibit them as being in my possession as secretary of the plaintiff. When I said the Irrigation Company of Pomona had developed more water I meant that it had bored more wells. The Irrigation Company of Pomona has never itself bored any wells; the plaintiff
313 bored the wells I referred to for the irrigation company under the contract; in fact, the development of water by boring wells has never been done by the irrigation companies, but by the plaintiff under its contract—I meant the contract introduced in evidence here. The development has been continued ever since. There has been a certain amount of water developed which has been referred to, and I was asked whether there had been more developed since. I said yes. I know that well-boring is going on all the time by the plaintiff under the contract referred to. I do not know just how many are being bored. The well-boring is carried on by the plaintiff; no wells have been bored by the Irrigation Company of Pomona. Quite a number have been bored by it through the plaintiff, but I don't know their location, and I don't know where nor exactly how many. The Irrigation Company of Pomona has issued fifteen thousand one hundred shares. I hold in trust for the Pomona Land and Water Company eight thousand and twenty-six & $\frac{40}{100}$ shares of that stock; the balance of the fifteen thousand one hundred shares have been transferred to the purchasers of lands from the Pomona Land and Water Company, and has been delivered: there may be some few certificates that have been prepared and have not been called for; the number of shares I hold I hold as trustee for the Pomona Land and Water Company. They were issued to Frank L. Palmer, trustee, for Pomona Land and Water Company, and have been issued, standing in that way, since September, 1886. There have been sold water rights by the plaintiff, and water has been delivered by the Irrigation Company of Pomona on these water rights to parties who do not hold stock in the company; parties who have not yet taken their stock, but who are entitled to it. Water rights were sold before the Irrigation Company of Pomona was organized with the provision that they should be exchanged for water stock. I think there
314 are some thirteen hundred acres of land which have been sold with water rights before the Irrigation Company of Pomona was organized, the water rights being one inch for each ten acres of land, and for that thirteen hundred acres the owners have not received stock of the Irrigation Company of Pomona that would represent one hundred and thirty inches of water. Stock for

a part of that is in my hands as trustee for plaintiff. The stock issued to Mr. Loud is not a part of the eight thousand and twenty-six & $\frac{40}{100}$ shares standing in my name as trustee. Of the twenty-one thousand shares of stock issued by the Del Monte Irrigation Company there remains five hundred sixty-three & $\frac{7}{10}$ shares in my name for plaintiff. Of the balance there is thirteen thousand six hundred shares held by the San Francisco Savings Union as mortgagee, and the rest is held by land-owners to whom the Pomona Land and Water Company have sold stock—have sold lands. Sixteen thousand shares of the twenty-one thousand shares were issued March 30th, 1887, four thousand shares issued February 1st, 1889, and one thousand shares August 10th, 1889. The shares issued to Mr. Loud are counted in the twenty-one thousand. I cancelled so many shares issued to me and standing in my name and had them reissued in the name of Mr. Loud. Of the six thousand shares in the Palomares Irrigation Company eighteen hundred fifty-two and $\frac{40}{100}$ stand in my name as trustee for plaintiff. Each of the directors hold one hundred shares, and the rest have been transferred to the purchasers of land. There was land sold with water rights where the water rights was not covered by stock delivered in the Del Monte Irrigation Company. I cannot state how much without making a computation and have not the data here. That was land sold with the provision that the water rights should be exchanged for water stock in the Del
315 Monte Irrigation Company, and the parties have not received all of the stock. There was some which was not called for. I said that one hundred shares represented one inch of water because that is so understood was the intention of the company, and that is the best answer I can make.

Cross-examined by plaintiff'- attorney:

All of Mr. Loud's stock or the stock issued in his name stands in the same situation as the Del Monte stock, having been included in the amount issued to plaintiff and then has been issued in his name. It was first transferred to me as trustee, and then I took up the amounts coming to him and had it issued in his name and produce it here.

Redirect:

There were lands sold with water rights in the Palomares district when the owners of land had not called for stock in that company, but I cannot state the amount. These sales are made before the irrigation company was formed, and the lands in the Del Monte district were also sold before the irrigation company was formed.

Defendant's attorney again offered in evidence the Charles W. Brown deed and the other deeds (referred to in Exhibits 19 and 20, hereto annexed) for the purpose of showing the water rights which are covered by the plaintiff and to supply which irrigation companies were formed; to the introduction of which deeds plaintiff's counsel objected as immaterial.

Mr. HANCHETT: I offer these to show the water rights plaintiff has sold.

The COURT: Has not the plaintiff the right to sell water rights? Do you propose to show it has sold them to other persons outside the parties mentioned in the articles—they are to be purchasers of the lands of the Pomona Company?

316 Mr. HANCHETT: No, sir; the purposes of the corporations are to furnish water to such persons as the Pomona Land and Water Co. has sold or may sell water rights to.

The COURT: I do not see that these deeds are admissible. I think I will adhere to my former ruling.

Mr. DUFFIELD: I want it understood that I do not admit the execution of these deeds or the proper certification of them.

Said deeds are excluded by the court, and defendant excepted.

Defendant's attorney offered in evidence a paper purporting to be a certified transcript of a patent from the United States to Henry Dallen and Ignacio Palomares and Ricardo Vegar, of the San José ranche, dated January 20th, 1875, for the purpose of showing that plaintiff had no title to the land.

Objected to by plaintiff's attorney as not properly certified—

First. Because the paper appears to be certified to by John W. Francis, county recorder, but attached to that certificate is a blank wafer with no official seal whatever.

Second. The paper purporting to be the certificate to the official character of the county recorder purports to be the certificate of the presiding judge of department No. 6 of the superior court of Los Angeles county, Cal.

Objection sustained. Defendant excepted.

Hereto annexed, marked Exhibit 26, is a copy of the certificate annexed to said transcript of patent.

HENRY M. LOUD, a witness sworn in his own behalf, testified as follows:

I am the defendant in this suit, and reside in Au Sable, Michi-
317 gan; have lived there about twenty-two years; passed through Pomona in 1886; was there only a day or two; was there next from February to May, 1887, and it was on that occasion that I negotiated the purchase under the contracts that are in question in this suit. I negotiated the purchase with O. F. Giffin, at Pomona, and I met him at the office of the Pomona Land and Water Company, I think first in Pomona, in the office or room where he was doing business. I did not have any negotiations with any other person besides Giffin.

The map or paper heretofore offered in evidence and marked Exhibit 18, hereto attached, was shown witness, and he says: I received from Mr. Giffin a map and circular lake that from the office of the Pomona Land and Water Company; also from other parties in the same office. I read the statement printed on it.

Q. Now, what representations were made by Mr. Giffin to you to induce you to make the purchase?

Objected to by the plaintiff's attorney for the reason that the defendant had not sufficiently connected Mr. Giffin's representations with the plaintiff, and also that unless defendant's counsel specifies the representations upon which he relied they are not admissible under the contract which merges all previous representations under its own terms, citing section 1625 of the Civil Code of California.

The COURT: I suppose if there is a representation in a contract that that representation be regarded as taking the place of any oral representations upon the same subject—that is, when oral representations come in conflict with written representations the oral representations cannot take the place of the written ones.

Defendant's attorney stated that he proposed to show that Mr. Giffin stated to Mr. Loud, in substance, that the plaintiff sold the water with the land; that Mr. Loud would get a good title
318 to the water as well as to the land, substantially what is stated in the circular, and that Mr. Loud took these contracts relying on the fact that he had got such title as was represented to him that he would get.

By the COURT: Is not that covered by the contract on which this suit was begun; the amount of water defendant was to have is carried by the covenant in the contract?

Mr. HANCHETT: My offer here is to show the representations that was made to him that he would obtain a title to the amount of water specified.

The COURT: I think that is covered by the covenant in the contract.

Mr. HANCHETT: The purpose of the offer was to show that the defendant was misled and defrauded.

Court sustained the objection, and defendant excepted.

Q. What representations did Mr. Giffin make to you relating to your liability if you should purchase?

Plaintiff's attorney objected to the question as incompetent and immaterial.

Defendant's attorney states that he offered to show by the witness that Mr. Giffin represented to him that there would be no liability other than the forfeiture of the amount which he paid.

The court sustained the objection.

Defendant excepted.

Witness continued: I had no knowledge or information relating to the articles of incorporation of either of the irrigation companies—the Del Monte Irrigation Company, the Palomares Irrigation Company, or the Irrigation Company of Pomona. I did not see them and knew nothing about them. I had no knowl-
319 edge whatever of the by-laws for either of those companies.

PLAINTIFF'S ATTORNEY: I think it is all covered by the same objection.

The COURT: Well, I think so. I think he is bound to know what the laws are.

DEFENDANT'S ATTORNEY: Does the testimony stand?

The COURT: I will pass upon objections when they are made.

PLAINTIFF'S ATTORNEY: I move to strike it out. I didn't know but that my brother would follow it up with some other question.

DEFENDANT'S ATTORNEY: I intend to show distinctly that at the time he made his purchase he had no knowledge of his own of the articles of association, by-laws, or of the terms of such articles and by-laws.

The COURT: I think it is objectionable and let it be stricken out.

Defendant excepted.

Witness continues: Since the fall of 1888 I have done nothing whatever on lot 11 or the lots in that neighborhood known as Live Oak park. I have not been upon them. I have not had anybody upon them. I have not fenced them. I have not worked them. They are entirely vacant.

Cross-examination:

I do not think that I have paid taxes on them. My agent paid some taxes in 1888, but not since, as I remember. The power of attorney to Mr. J. E. McComas given by me has not been revoked. He also has a power of attorney to look after the lands and to sell them. I think I authorized Mr. McComas to pay taxes on lot 11 in 1887; perhaps 1888. The said 1887 taxes were paid in 1888, I think. The work which they did for me in part consisted in putting up streets signs upon the corners of streets and names of streets. I paid for the signs and they were set upon the
320 premises. I did not take them down and so far as I know they are there yet.

Q. There has been no subdivision of lot 11?

A. No, sir.

Q. What constituted Live Oak park—what lots?

A. No lots I know of; it is merely a general term to a section of country east of Alexandrine and running over in San Bernardino county. It is not a geographical or official division, or anything of that kind.

Q. It was a division of your own creation?

A. The sign is up on that land.

Q. What land does that include? Name the lots which it includes; what you meant to constitute Live Oak park.

A. It is an indefinite matter; set up on the east side of Alexandrine avenue; it is known as Live Oak park; but I know of no geographical description or legal description of any lands appertaining to it.

Q. What part or parcels of land did you include in your term of Live Oak park?

A. It is in the northeast Pomona tract.

Q. You bought certain lots. Which of those lots or portions of lots constituted Live Oak park, as you call it?

A. I didn't understand that any part of the lands which I bought constituted the whole of Live Oak park. It is merely a term given to that section of country, the same as a suburb of Detroit might be known, but not geographically known.

Q. It is a name you gave—you put up a sign?

A. Yes; I put up a sign.

Q. On what lot did you put up that sign?

A. I think it was put on lot 16. The*t* worked on lot 11; lot 11 corners on lot 16. We did not subdivide any lots. I don't
321 recollect that we laid out any new streets. I think I named Alexandrine avenue after consultation with several gentlemen; the street was there before. I had the streets turnpiked in connection with other gentlemen owning lands there. The lots along which I had the streets turnpiked were lots 16, 23, 25, 28, 29, 30, 31; on the west of it lie lots 6, 13, 15, 21, 22, 26, 27, 30, and 32. In the northeast Pomona tract lots 11 and 17 are east of lot 12, and Alexandrine avenue lies in the west of lots 11 and 17. I made streets on all dividing lines between lots, and made a street between lots 11 and 17. I have forgotten what I called it. So far as I know, that street is there yet. So far as I know, it bears the name I put up.

Q. How long were you in Pomona on a visit at the time when the purchases were made? I understand the question is confined to lot 11.

Objected to as not proper cross-examination.

A. I do not remember. I went ther- about midwinter and staid until——

Objection renewed.

Defendant's counsel states: We don't deny but that Mr. Loud did take possession.

The COURT: You only claim that he has done nothing there since the fall of 1888.

Mr. HANCHETT: We don't deny that he went on that lot—commenced making improvements in the spring of 1887—but our testimony has been confined to showing from the fall of 1888 he has done nothing there and has not been there.

The COURT: I don't think the simple fact that he has done nothing since the fall of 1888 is sufficient to avoid the legal consequences, or that he did avoid them.

Mr. DUFFIELD: I move to strike out the testimony.

The COURT: If there is nothing more than that I will strike it out.

Defendant excepted.

The COURT: If you offer any evidence showing that by mutual consent the contract was abandoned—anything of that kind—
322 that would be material. If he went into possession after what is called the application here was made and exercised ownership over that land and paid taxes on it—paid one thousand dollars on the first payment—I do not think that the fact that since a certain date, say since the fall of 1888, he has done nothing changes the legal inference to be derived.

DEFENDANT'S ATTORNEY: There is more than one question in this cause. Not only the question in reference to this application and the failure to pay the first payment and going into possession, but also the fact that the plaintiff ought to have tendered an executed contract, and the further fact that the payment- of 1888 and 1889 have gone by and no tender has been made on the part of the plaintiff.

The COURT: I think that it is immaterial.

Defendant excepted.
Defendant rests.

FRANK L. PALMER recalled by plaintiff:

I have completed the computations of the contracts in this cause and the amount due upon the contracts and applications in the sum of seventy-nine thousand eight hundred nineteen and $\frac{30}{100}$ dollars. The total amount due, including interest upon the purchase of lot 11, Pomona tract, is ten thousand eight hundred and two and $\frac{6}{100}$ dollars. In three instances amount due for interest in 1888 was paid; with that exception, the computation includes the amount of the second and third payments in all contracts and applications, with interest to May 1st, 1890. On application for lot eleven (11), northeast Pomona tract, only fifteen hundred and ten dollars was paid on the first payment.

Plaintiff rests.
323 The foregoing is the substance of all the evidence in the case.

Defendant's counsel thereupon requested the court to charge the jury as follows:

1st. The plaintiff is not entitled to recover upon the contracts declared upon in the 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, and 49th counts of the declaration, for the reason that there is no averment nor proof of any delivery or tender by the plaintiff to the defendant of an executed contract for the land described in the contracts declared upon. In order to entitle the plaintiff to recover, a contract executed by the plaintiff for a sale of the land and water rights described in said counts should have been delivered or tendered to the defendant by the plaintiff upon the payment by the defendant of the first payment provided for in the contracts sued upon, and the plaintiff should have averred in his declaration and proved such delivery or tender.

2nd. The plaintiff is not entitled to recover upon the contracts

described in said counts for the reason that such contracts are not proved. The contracts offered in evidence by the plaintiff under these counts are different from the contracts declared upon, for the reason that the contracts offered require that the plaintiff should deliver to the defendant contracts executed by the plaintiff for a sale of the lands and water rights to the defendant when the defendant made the first payment provided for in the contracts, while the contracts declared upon contain no such requirements.

3rd. The plaintiff is not entitled to recover upon said counts for the reason that the declaration does not aver and the evidence does not show any tender by the plaintiff to the defendant of a deed for the land and water rights described in the contracts.

324 4th. The plaintiff is not entitled to recover upon said counts for the reason that the declaration does not aver what are the water rights pertaining to the lands described in the contract and does not aver a tender of any contract or deed to the defendant for such water rights.

5th. The plaintiff is not entitled to recover under said counts for the reason that the declaration does not aver that the plaintiff was the owner of the water rights described in the contracts referred to in said counts and an offer or tender to the defendant of a conveyance of the title to such water rights.

6th. The plaintiff is not entitled to recover upon the contracts described in the 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, and 48th counts of the declaration, because the declaration does *not* aver and the evidence does not show that the plaintiff had a good title to the lands described in said contracts and a tender of a conveyance of such title to the defendants at the time when the last payment upon such contracts became due by the terms of such contract- or at any subsequent time.

7th. The plaintiff is not entitled to recover upon the contracts described in the first forty counts of the declaration for the reason that the declaration does not aver and the evidence does not show that the plaintiff had a good title to the stock described in said contracts and a tender of the conveyance of such title to the defendant at the time when the last payments upon such contracts became due by the terms of such contracts or at any subsequent time.

8th. The plaintiff is not entitled to recover upon the contracts described in the first, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 21*th*, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th,

325 and 31st counts of the declaration for the reason that the declaration does not aver and the evidence does not show that the plaintiff had a good title to the lands described in said contracts and a tender of conveyance of such title to the defendant at the time when the last payments upon such contracts became due by the terms of such contracts or at any subsequent time.

9th. The plaintiff is not entitled to recover upon the contract- described in the 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, and 40th counts of the declaration for the reason that the declaration does not aver and the evidence does not show that the plaintiff had a good title

to the lands described in said contracts and a tender of a conveyance of such title to the defendant at the time when the last payment upon such contracts became due by the terms of such contracts or at any subsequent time.

10th. The plaintiff is not entitled to recover upon the contracts declared upon in said first forty counts, because the declaration does not aver any tender by the plaintiff to the defendant of a deed of the lands and stocks described in said contracts at the time when the last payment became due on said contracts and does not aver any reason why such tender was not made.

11th. The plaintiff is not entitled to recover upon the contract-declared upon in said first forty counts, because the declaration does not aver any tender of a deed to the defendant by the plaintiff of the lands and stock described in said contracts at any time and does not aver any reason why such tender was not made.

326 12th. The plaintiff is not entitled to recover upon the contracts declared upon in the said first forty counts. The declaration does not aver and the evidence does not show that the plaintiff tendered or offered the defendant the stock described in said contract- at the time when the last payments on said contracts became due and the declaration does not aver any reason why such tender was made.

13th. The plaintiff is not entitled to recover upon the contracts described in said first forty counts for the reason that the declaration does not aver and the evidence does not show any tender by the plaintiff to the defendant at any time of the stock described in said contracts.

14th. The contracts declared upon in the first, 3rd, 4th, 5th, 6th, 21st, 23rd, 24th, 25th, and 26th counts require the conveyance and delivery by the plaintiff to the defendant of stock in the Del Monte Irrigation Company, which stock represents water in the amount of one inch of water under four-inch pressure, measured from the center of aperture, for each one hundred shares of stock and in that proportion of water for the amount of stock specified in the contracts respectively, and this means that such stock shall convey a title to the defendant of such water. In order to recover the plaintiff is required to aver in the declaration and prove that the stock in said contracts does represent and convey title to such amount of water, and that the plaintiff tendered such stock to the defendant. Because the plaintiff has not made such averment and proof it is not entitled to recover upon such contracts.

15th. The plaintiff is not entitled to recover upon said
327 first, 3rd, 4th, 5th, 6th, 21st, 23rd, 24th, 25th, and 26th counts because the evidence in the case fails to show that the stock described in the contracts declared upon in said counts represents the water or the title to water, as required by the contracts.

16th. The plaintiff is not entitled to recover upon the contracts declared upon in said 1st, 3rd, 4th, 5th, 6th, 21st, 23rd, 24th, 25th, and 26th counts because the evidence shows that the plaintiff did not have title to such stock as is described in said contracts, viz., stock which represents or constitutes a title to water at the rate of

one inch of water under four-inch pressure, measured from the center of aperture, and was therefore not in a position to perform the contracts on its part.

17th. The plaintiff is not entitled to recover upon the contracts described in said 1st, 3rd, 4th, 5th, 6th, 21st, 23rd, 24th, 25th, and 26th counts because the plaintiff has not tendered to the defendant such stock as the contracts require.

18th. The contracts declared upon in said 2nd, 7th, 8th, 9th, 10th, 11th, 22nd, 27th, 28th, 29th, 30th, and 31st counts require the conveyance and delivery by the plaintiff to the defendant of stock in the Irrigation Co. of Pomona, which stock represents water in the amount of one inch of water under a four-inch pressure, measured from center of aperture, for each 100 shares of stock and in that proportion of water for the amount of stock specified in the contracts respectively, and this means that such stock shall convey a title to the defendant of such water. In order to recover the
328 plaintiff is required to aver in the declaration and prove that the stock specified in said contracts does represent and convey title to such amount of water, and that the plaintiff tendered such stock to the defendant. Because the plaintiff has not made such averment and proof it is not entitled to recover on said contracts.

19th. The plaintiff is not entitled to recover upon said 2nd, 7th, 8th, 9th, 10th, 11th, 22nd, 27th, 28th, 29th, 30th, and 31st counts because the evidence in the case fails to show that the stock described in the contracts declared upon in said counts represents water or the title to water, as required by the contracts.

20th. The plaintiff is not entitled to recover upon the contracts declared upon in said 2nd, 7th, 8th, 9th, 10th, 11th, 22nd, 27th, 28th, 29th, 30th, and 31st counts because the evidence shows that the plaintiff did not have title to such stock as is described in said contracts, viz., stock which represents or constitutes a title to water at the rate of one inch of water under four-inch pressure, measured from the center of aperture, and was therefore not in position to perform the contracts on its part.

21st. The plaintiff is not entitled to recover upon the contracts described in said 2nd, 7th, 8th, 9th, 10th, 11th, 22nd, 27th, 28th, 29th, 30th, and 31st counts because the plaintiff has not tendered to the defendant such stock as the contracts require.

22nd. The contracts declared upon in said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, and 40th counts require the conveyance and de-
329 livery by said plaintiff to the defendant of stock in the Palomares Irrigation Co., which stock represents water in the amount of one inch of water under four-inch pressure, measured from center of aperture for each one hundred shares of stock and in that proportion of water for the amount of stock specified in the contracts respectively, and this means that such stock shall convey a title to the defendant of such water. In order to recover the plaintiff is required to aver in the declaration and prove that the stock specified in said contracts does represent and convey title to such

amount of water, and that the plaintiff tendered such stock to the defendant. Because the plaintiff has not made such averment and proof it is not entitled to recover upon said contracts.

23rd. The plaintiff is not entitled to recover upon said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, and 40th counts because the evidence in the case fails to show that the stock described in the contracts declared upon in said counts represents water or the title to water, as required by the contracts.

24th. The plaintiff is not entitled to recover upon the contracts declared upon in said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, and 40th counts because the evidence shows that the plaintiff did not have title to such stock as described in said contracts, viz., stock which represents a title to water at the rate of one inch of water under four-inch pressure, measured from center of aperture, and was therefore not in position to perform the contracts on its part.

330 25th. The plaintiff is not entitled to recover upon the contracts described in said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, and 40th counts because the plaintiff has not tendered to the defendant such stock as the contracts require.

26th. The plaintiff is not entitled to recover upon the contracts declared upon in the 49th count for the reasons:

1st. The declaration avers that the defendant did not purchase the property and did not make the first payment, and the evidence shows that the first payment was not made, and therefore by the terms of the contract the plaintiff has no right to recover.

2nd. Because the plaintiff does not aver and show a tender of a contract executed by the plaintiff to the defendant for the land.

27th. Upon the whole evidence the plaintiff is not entitled to recover in this suit.

The court refused each and all of said requests of defendant and charged the jury as follows:

GENTLEMEN OF THE JURY: I think there are no questions of fact to be submitted to you in this case. I shall therefore instruct you as a matter of law to return a verdict for the plaintiff for seventy-nine thousand eight hundred — nineteen & $\frac{30}{100}$ dollars.

Defendant excepted to the charge as given and to the refusal to charge as requested in each of defendant's request- to charge.

330½ And because none of the exceptions so offered and made to the decisions and opinion of the district judge in the trial of said cause do appear upon the record of said trial, on the prayer of said defendant by his counsel and upon consent of the plaintiff by its counsel I, acting as circuit judge, have signed this bill of exceptions according to the law in such case made and provided, this 25th day of August, 1890.

HENRY B. BROWN,
District Judge, Acting as Circuit Judge of the United States for the Eastern District of Michigan.

EXHIBIT 1.

Application for Purchase.

POMONA, CAL., *April 15th*, 1887.

Received from H. M. Loud seventy-five dollars deposit on application for purchase of northeast quarter (N. E. ¼) of lot twenty-two (22), containing ten (10) acres of land according to map of the San Antonio tract, duly recorded, in Book 3, pp. 7, of map records of San Bernardino county, with usual water rights pertaining to said tract, at the price of fifteen hundred dollars and on the following terms: Seventy-five dollars cash deposit as above:

First payment, $300.00, within 60 days from date; second payment, $562.50, on or before April 15th, 1888; third payment, $562.50, on or before April 15th, 1889; second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the premises I, H. M. Loud, hereby agree to purchase said property and pay for
331 the same at the price and on the terms above set out; and in consideration that the Pomona Land and Water Company has withdrawn from the market the above-described land for 60 days, so that the said H. M. Loud may purchase the same at the above-agreed-on price in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages suffered and the liquidated damages received by said company on account of the withdrawal of the land from the market as aforesaid. Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above-described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

H. M. LOUD. [SEAL.]
THOMAS & EASTON. [SEAL.]
F. MACPHERSON, *Ag't.*

Endorsed: Pomona, June 20th, 1887. Rec'd $300.00, being balance of first payment on the within application. Pomona Land and Water Company. F. L. Palmer, treas.

EXHIBIT 2.

Application for Purchase.

POMONA, *April 15th*, 1887.

Received from H. M. Loud eighty dollars deposit on appli-
332 cation for purchase of southeast quarter (S. E. ¼) of lot thirty-five (35), containing ten acres of land according to map of

the San Antonio tract, duly recorded in Book 3, page 7, of map records of San Bernardino county, with usual water right pertaining to said tract, at the price of sixteen hundred dollars ($1,600), and on the following terms: Eighty (80) dollars cash deposit as above; first payment, $320.00, within 60 days from date; second payment, $600.00, on or before April 15th, 1888; third payment, $600.00, on or before April 15th, 1889; second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the premises I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; and in consideration that the Pomona Land and Water Company has withdrawn from the market the above-described land for 60 days, so that the said H. M. Loud may purchase the same at the above-agreed-on price in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages suffered and the liquidated damages received by said company on account of the withdrawal of the land from the market as aforesaid. Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above-described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered and executed contract to him for the same.

H. M. LOUD. [SEAL.]
THOMAS & EASTON. [SEAL.]
F. MACPHERSON, *Ag't.*

333 Endorsed: Pomona, June 20th, 1887. Rec'd $320.00, being balance of first payment on the within application. Pomona Land and Water Company. F. L. Palmer, treas.

EXHIBIT 3.

Application for Purchase.

POMONA, CAL., *April 15th*, 1887.

Received from H. M. Loud ninety-four dollars deposit on application for purchase of southwest quarter of lot twenty-two (22), containing twelve $\frac{50}{100}$ acres of land according to map of the San Antonio tract, duly recorded in Book 3, page 7, of maps, records of San Bernardino county, with usual water rights pertaining to said tract, at the price of eighteen hundred and seventy-five dollars and on the following terms: Ninety-four ($94) dollars cash deposit as above.

First payment, $376.00, within 60 days from date; second payment, $702.50, on or before April 15th, 1888; third payment, $702.00, on or before April 15th, 1889; second and third payments to bear interest from the date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the premises I,

H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; and in consideration that the Pomona Land and Water Company has withdrawn from the market the above-described land for 60 days, so that the said H. M. Loud may purchase the same at the above-agreed-on price in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned,
334 then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages suffered and the liquidated damages received by said company on account of the withdrawal of the land from the market as aforesaid. Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above-described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

H. M. LOUD. [SEAL.]
THOMAS & EASTON. [SEAL.]
F. MACPHERSON, *Ag't.*

Endorsed: Pomona, June 18th, 1887. Rec'd $376.00, being balance of first payment on the within application. Pomona Land and Water Company. F. L. Palmer, treas.

EXHIBIT 4.

Application for Purchase.

POMONA, CAL., *April 15th*, 1887.

Received from H. M. Loud eighty dollars deposit on application for purchase of southwest quarter (S. W. ¼) of lot thirty-five (35), containing ten acres of land according to map of San Antonio tract, duly recorded in Book 3, page 7, of map records of San Bernardino county, with usual water right pertaining to said tract, at the
335 price of sixteen hundred dollars and on the following terms: Eighty (80) dollars cash deposit as above.

First payment, $320.00, within 60 days from date; second payment, $600.00, on or before April 15th, 1888; third payment, $600.00, on or before April 15th, 1889; second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the premises I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; and in consideration that the Pomona Land and Water Company has withdrawn from the market the above-described land for 60 days, so that the said H. M. Loud may purchase the same at the above-agreed-on price, in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water

Company as the estimated damages suffered and the liquidated damages received by said company on account of the withdrawal of the land from the market as aforesaid. Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above-described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

H. M. LOUD. [SEAL.]
THOMAS & EASTON. [SEAL.]
F. MACPHERSON, *Ag't.*

Endorsed: Pomona, June 20th, 1887. Rec'd $320.00, being balance of first payment in the within application. Pomona Land and Water Company. F. L. Palmer, treas.

336 EXHIBIT 5.

Application for Purchase.

POMONA, CAL., *April 15th*, 1887.

Received from H. M. Loud ninety-eight dollars deposit on application for purchase of northwest quarter (N. W. ¼) of lot thirty-five (35), containing twelve $\frac{2}{10}$ acres of land according to map of the San Antonio tract, duly recorded in Book 3, page 7, of map records of San Bernardino county, with usual water right pertaining to said tract, at the price of nineteen hundred and fifty-two dollars and on the following terms: Ninety-eight (898) dollars cash deposit as above.

First payment, $390, within 60 days from date; second payment, $732, on or before April 15th, 1888; third payment, $732, on or before April 15th, 1889; second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the premises I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; and in consideration that the Pomona Land and Water Company has withdrawn from the market the above-described land for 60 days, so that the said H. M. Loud may purchase the same at the above-agreed-on price, in case the said H. M. Loud fails or refuses to make said first payment, as above, within *in* the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages suffered and the liquidated damages received by said company on account of the withdrawal of the land from the market as aforesaid. Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the
337 possession of the above-described land shall inure to said H.

M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

H. M. LOUD. [SEAL.]
THOMAS & EASTON. [SEAL.]
F. MACPHERSON, *Ag't.*

Endorsed: Pomona, June 20th, 1887. Rec'd $390.00, being balance of first payment on the within application. Pomona Land and Water Company. F. L. Palmer, treas.

EXHIBIT 6.

Application for Purchase.

POMONA, CAL., *April 15th*, 1887.

Received from H. M. Loud one hundred dollars deposit on application for purchase of northeast quarter (N. E. ¼) of lot thirty-five (35), containing twelve $\frac{6}{10}$ acres of land according to the map of the San Antonio tract, duly recorded in Book 3, p. 7, of map records of San Bernardino county, with usual water right pertaining to said tract, at the price of two thousand and sixteen dollars and on the following terms: One hundred dollars (100) cash deposit as above. First payment, $404, within 60 days from date; second payment, $756, on or before April 15th, 1888; third payment, $756, on or before April 15th, 1889; second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the premises I, H. M.
338 Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; and in consideration that the Pomona Land and Water Company has withdrawn from the market the above-described land for 60 days, so that the said H. M. Loud may purchase the same at the above-agreed-on price in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages suffered and the liquidated damages received by said company on account of the withdrawal of the land from the market aforesaid. Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above-described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

H. M. LOUD. [SEAL.]
THOMAS & EASTON. [SEAL.]
F. MACPHERSON, *Ag't.*

Endorsed: Pomona, June 20th, 1887. Rec'd $404, being balance of first payment on the within application. Pomona Land and Water Company. F. L. Palmer, treas.

EXHIBIT 7.

Application for Purchase.

POMONA, CAL., *April 15th*, 1887.

Received from H. M. Loud sixty-five dollars deposit on ap-
339 plication for purchase of northwest quarter of lot twenty-two (22), containing eight $\frac{7}{10}$ acres of land according to map of the San Antonio tract, duly recorded in Book 3, p. 7, of map records of San Bernardino county, with usual water right pertaining to said tract, at the price of thirteen hundred and five (1,305) dollars and on the following terms: Sixty-five (65) dollars cash deposit as above.

First payment, $260, within 60 days from date; second payment, $490, on or before April 15th, 1888; third payment, $490, on or before April 15th, 1889; second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the premises I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; and in consideration that the Pomona Land and Water Company has withdrawn from the market the above-described land for 60 days, so that the said H. M. Loud may purchase the same at the above-agreed-on price in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages received by said company on account of the withdrawal of the land from the market as aforesaid. Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above-described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

H. M. LOUD. [SEAL.]
THOMAS & EASTON. [SEAL.]
F. MACPHERSON, *Ag't.*

340 Endorsed: Pomona, June 20th, 1887. Rec'd $260, being balance of first payment on the within application. Pomona Land and Water Company. F. L. Palmer, treas.

EXHIBIT 8.

Application for Purchase.

POMONA, CAL., *April 15th*, 1887.

Received from H. M. Loud seventy-five dollars deposit on application for purchase of southeast quarter (S. E. $\frac{1}{4}$) of lot twenty-two (22), containing ten acres of land according to map of the San An-

tonio tract, duly recorded in Book 3, p. 7, of map records of San Bernardino county, with usual water right pertaining to said tract, at the price of fifteen hundred dollars and on the following terms: Seventy-five (75) dollars cash deposit as above.

First payment, $300, within 60 days from date; second payment, —, on or before April 15th, 1888; third payment, $562.50, on or before April 15th, 1889; second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the premises I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; and in consideration that the Pomona Land and Water Company has withdrawn from the market the above-described land for 60 days, so that the said H. M. Loud may purchase the same at the above-agreed-on price in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages suffered and the liquidated damages received
341 by said company on account of the withdrawal of the land from the market as aforesaid. Time is hereby declared to be — the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above-described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

H. M. LOUD. [SEAL.]
THOMAS & EASTON. [SEAL.]
F. MACPHERSON, *Ag't.*

Endorsed: Pomona, June 18th, 1887. Rec'd $300, being balance of first payment on the within application. Pomona Land and Water Company. F. L. Palmer, treas.

EXHIBIT 9.

Application for Purchase.

POMONA, CAL., *April 8th*, 1887.

Received from H. M. Loud five hundred and ten dollars deposit on application for purchase of lot eleven (11), containing forty & $\frac{a}{10}$ acres of land according to map of the northeast Pomona tract, duly recorded in Book 5, p. 461, of miscellaneous records of Los Angeles county, at the price of ten thousand two hundred and twenty-five dollars and on the following terms: Five hundred and ten dollars cash deposit as above.

First payment, $2,045, within 60 days from date; second payment, $3,835, on or before April 8th, 1888; third payment, $3,835,
342 on or before April 8th, 1889; second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the

premises I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; and in consideration that the Pomona Land and Water Company has withdrawn from the market the above-described land for 60 days, so that the said H. M. Loud may purchase the same at the above-agreed-on price in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages suffered and the liquidated damages received by said company on account of the withdrawal of the land from the market as aforesaid. Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above-described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

THOMAS & EASTON,
O. F. GIFFIN, *Agent.* [SEAL.]
HENRY M. LOUD. [SEAL.]

Endorsed: Pomona, June 17th, 1887. Rec'd $500 on ac. of within application. Pomona Land and Water Company. F. L. Palmer, treas.

POMONA, *July 2nd*, 1887.

Rec'd $500 on ac. of within application.
POMONA LAND AND WATER COMPANY.
F. L. PALMER, *Treas.*

343 EXHIBIT 11.

Articles of Incorporation of the Pomona Land and Water Company.

Know all men by these presents that we, the undersigned, have this day voluntarily associated ourselves for the purpose of forming a corporation under the laws of the State of California, and we certify:

First. That the name of said corporation is the Pomona Land and Water Company.

Second. The purposes for which this corporation is formed are to acquire by purchase, lease, or in any other manner real estate — the counties of San Bernardino and Los Angeles, State of California; to hold, develop, divide, subdivide, and sell, convey, and mortgage such real estate, and to acquire by purchase, appropriation, lease, or in any other manner water, water rights in said counties, and to hold, develop, distribute, lease, sell, and convey water and water rights and to manage the same; and for the purpose of the collection and distribution of water for irrigation, domestic, manufacturing, and other kindred purposes to acquire by purchase or in any other manner, to hold, contract, maintain, operate dams, ditches,

flumes, pipes, reservoirs, and sink wells, and to take, hold, enforce, sell, and convey mortgages on property, and otherwise generally to transact a general business in the State of California of purchasing, acquiring, leasing, holding, developing, letting, selling, conveying, and mortgaging lands and water rights in said counties, and to do any business lawful to be done by such corporation.

Third. That the place where its principal business is to be transacted shall be in the city and county of San Francisco,
344 State of California; that meetings of the board of directors may be held in the town of Pomona, county of Los Angeles, State of California.

Fourth. That the term for which it is to exist is fifty (50) years from and after date of its -corporation.

Fifth. That the number of its directors shall be five, and that the names and residences of those who are appointed for the first year are:

Names.	Residences.
C. T. Mills	Brooklin, Alameda Co., Cal.
J. P. Pierce	Santa Clara Co., Cal.
H. A. Palmer	Oakland Co., Cal.
F. J. Hall	Riverside Co., Cal.
M. L. Wicks	Los Angeles Co., Cal.

Sixth. That the amount of capital stock of this corporation shall be $500,000, — into 5,000 shares of the par value of $100 each.

Seventh. That the actual amount of the said capital stock subscribed is $500,000, and the following are the names of the persons by whom the same has been subscribed:

Name of stockholders.	No. shares.	Amount.
C. T. Mills	3,055	$305,500
H. A. Palmer	155	15,000
F. J. Hall	170	17,000
M. L. Wicks	1,125	112,500
J. P. Pierce	500	50,000

In witness whereof we have hereunto set our hands and seals this the 13th day of October, 1882.

C. P. MILLS.
JAMES P. PIERCE.
H. A. PALMER.
F. J. HALL.
M. L. WICKS.

345 EXHIBIT 12.

Articles of Incorporation of the Irrigation Company of Pomona.

Know all men by those presents that we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California, and we hereby certify:

First. That the name of said corporation is the Irrigation Company of Pomona.

Second. That the purposes for which this corporation is formed is to acquire water rights, flumes, ditches, aqueducts, reservoirs, or other property that may be necessary of convenient for the supplying of water to such person or persons or their assigns in the township of San José, county of Los Angeles, State of California, to whom the Pomona Land and Water Company, a corporation, has sold water rights, or to whom it may hereafter sell water rights, or to whom it may transfer water stock of this corporation, but to no other person or persons whomsoever; also to maintain, construct, and repair all ditches, flumes, aqueducts, and reservoirs that may be necessary to the delivery of water to the person or persons hereinbefore described.

Third. That the place where its principal business is to be transacted is Pomona, in the county of Los Angeles, State of California.

Fourth. That the term for which it is to exist is fifty years from and after the date of its corporation.

Fifth. That the number of its directors shall be five, and that the names and residences of those who are appointed for the first year are:

346 Names. Residences.

S. T. Alexander ---------- Oakland, Alameda county, Cal.
William O. Smith ---------- Oakland, Alameda county, Cal.
H. A. Palmer ---------- Berkeley, Alameda county, Cal.
F. L. Palmer ---------- Pomona, Los Angeles county, Cal.
W. D. Gelette ---------- Pomona, Los Angeles county, Cal.

Sixth. That the amount of capital stock of this corporation shall be two hundred and forty-five thousand dollars, divided into twenty-four thousand five hundred shares of the par value of ten dollars each.

Seventh. That the actual amount of said capital stock subscribed is five thousand dollars, and the following are the names of the persons by whom the same has been subscribed:

S. T. Alexander ---------- 100 shares ---------- Amount, $1,000 00
William O. Smith ---------- 100 shares ---------- Amount, 1,000 00
H. A. Palmer ---------- 100 shares ---------- Amount, 1,000 00
F. L. Palmer ---------- 100 shares ---------- Amount, 1,000 00
W. D. Gelette ---------- 100 shares ---------- Amount, 1,000 00

In witness whereof we have hereunto set our hands and seals this 16th day of July, A. D. 1886.

SAM'L T. ALEXANDER. [SEAL.]
WILLIAM O. SMITH. [SEAL.]
H. A. PALMER. [SEAL.]
W. D. GELETTE. [SEAL.]
F. L. PALMER. [SEAL.]

The words "five hundred" were underlined before signing.

J. A. CLARK,
Notary Public.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

On this 16th day of July, one thousand eight hundred and eighty-six, before me, J. A. Clark, a notary public in and for said
347 county, residing therein, duly commissioned and sworn, personally appeared Sam'l T. Alexander, William O. Smith, H. A. Palmer, and W. D. Gelette, known to me to be the persons described in and whose name- are subscribed to the within instrument, and acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the county of Los Angeles, the day and year first above written.

[SEAL.] J. A. CLARK,
Notary Public.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

On this 17th day of July, one thousand eight hundred and eighty-six, before me, J. A. Clarke, a notary public in and for the county, residing therein, duly commissioned and sworn, personally appeared F. L. Palmer, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the county of Los Angeles, the day and year first above written.

[SEAL.] J. A. CLARKE,
Notary Public.

348 EXHIBIT 13.

Articles of Incorporation of the Del Monte Irrigation Company.

Know all men by these presents that we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California, and we hereby certify:

First. The name of said corporation is the Del Monte Irrigation company.

Second. That the purposes for which this corporation is formed *is* to acquire water, water rights, flumes, ditches, aqueducts, reservoirs, and other property that may be necessary or convenient for the supplying of water to such person or persons or their assigns in the counties of Los Angeles and San Bernardino, in the State of California, to whom the Pomona Land and Water Company has sold water rights, or to whom it may hereafter sell water rights, or to whom it may transfer water stock of this corporation, but to no other person or persons whomsoever; also to maintain, construct, and repair all ditches, flumes, aqueducts, and reservoirs that may be necessary or convenient for the delivery of water to the person or persons hereinbefore described; also the right to purchase the

privilege of developing water upon any lands in the counties hereinbefore mentioned, and to develop water thereon for the uses and purposes hereinbefore stated.

Third. That the place where its principal business is to be transacted is Pomona, in the county of Los Angeles, State of California.

Fourth. That the terms for which it is to exist is fifty years from and after the date of its -corporation.

349 Fifth. That the number of its directors shall be five, and that the names and residences of those who are appointed for the first year are:

Names.	Residence.
B. S. Nichols	Burlington, Vermont.
H. A. Palmer	Berkeley, Alameda Co., Cal.
F. L. Palmer	Pomona, Los Angeles Co., Cal.
H. E. Stoddard	Pomona, Los Angeles Co., Cal.
P. C. Tonner	Pomona, Los Angeles Co., Cal.

Sixth. That the amount of capital stock of this corporation shall be four hundred thousand dollars, divided into forty thousand shares of the par value of ten dollars each.

Seventh. That the actual amount of said capital stock subscribed is five thousand dollars, and the following are the names of persons by whom the same has been subscribed:

B. S. Nichols	100 shares	Amount, $1,000 00
H. A. Palmer	100 shares	Amount, 1,000 00
F. L. Palmer	100 shares	Amount, 1,000 00
H. E. Stoddard	100 shares	Amount, 1,000 00
P. C. Tonner	100 shares	Amount, 1,000 00

In witness whereof we have hereunto set our hands and seals this 21st day of February, A. D. 1887.

B. S. NICHOLS.
H. A. PALMER.
F. L. PALMER.
H. E. STODDARD.
P. C. TONNER.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

On this twenty-first day of February, in the year one thousand eight hundred and eighty-seven, before me, Jos. Wright, a justice of the peace in and for the county of Los Angeles, personally
350 appeared B. S. Nichols, H. A. Palmer, F. L. Palmer, H. E. Stoddard, and P. C. Tonner, to me — to be the persons described in and whose names are subscribed to and who executed the within instrument, and they acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand, at my office, in the county of Los Angeles, the day and year in this certificate first above written.

JOS. WRIGHT,
Justice of the Peace.

EXHIBIT 14.

Articles of Incorporation of the Palomares Irrigation Company.

Know all men by these presents that we, the undersigned, have this day voluntary associated ourselves together for the purpose of forming a corporation under the laws of the State of California.

And we hereby certify, first, that the name of the said corporation is the Palomares Irrigation Company.

Second. That the purposes for which the corporation is formed *is* to acquire water, water rights, flumes, ditches, aqueducts, reservoirs, and other property that may be necessary or convenient for the supplying of water to such person or persons or their assigns in the counties of Los Angeles and San Bernardino, State of California, to whom the Pomona Land and Water Company has sold water rights, or to whom it may hereafter sell water rights, or to whom it may transfer water stock of this corporation, but to no other person or persons whomsoever; also to maintain, construct, and repair all ditches, flumes, aqueducts, and reservoirs that may be necessary or convenient for the delivery of water to the person or persons hereinbefore described; also the right to purchase the privilege of developing water upon any lands in the counties hereinbefore mentioned and to develop water thereon for the use and purpose hereinbefore stated.

351

Third. That the place where its principal business is to be transacted is Pomona, in the county of Los Angeles, State of California.

Fourth. That the term for which it is to exist is fifty years from and after the date of its -corporation.

Fifth. That the number of its directors shall be five, and that the names and residence of those who are appointed for the first year are:

Names.	Residence.
B. S. Nichols	Burlington, Vermont.
H. A. Palmer	Berkeley, Alameda Co., Cal.
F. L. Palmer	Pomona, Los Angeles Co., Cal.
H. E. Stoddard	Pomona, Los Angeles Co., Cal.
P. C. Tonner	Pomona, Los Angeles Co., Cal.

Sixth. That the amount of capital stock of this corporation shall be two hundred thousand dollars ($200,000.00), divided into twenty thousand shares of the par value of ten dollars ($10.00) each.

Seventh. That the actual amount of said capital stock subscribed is five thousand dollars, and the following are the names of the persons by whom the same has been subscribed:

B. S. Nichols	100 shares	Amount, $1,000 00
H. A. Palmer	100 shares	Amount, $1,000 00
F. L. Palmer	100 shares	Amount, $1,000 00
H. E. Stoddard	100 shares	Amount, $1,000 00
P. C. Tonner	100 shares	Amount, $1,000 00

352 In witness whereof we have hereunto set our hands and seals this 21st day of February, A. D. 1887.

H. A. PALMER.
F. L. PALMER.
P. C. TONNER.
B. S. NICHOLS.
H. E. STODDARD.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

On this twenty-third day of February, in the year one thousand eight hundred and eighty-seven, before me, Jos. Wright, in and for the county of Los Angeles, personally appeared H. A. Palmer, F. L. Palmer, P. C. Tonner, B. S. Nichols, and H. E. Stoddard, known to me to be the persons described in and whose names are subscribed to and who executed the within instrument, and they acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand, at my office, in the county of Los Angeles, the day and year in this certificate first above written.

JOS. WRIGHT,
Justice of the Peace.

EXHIBIT 15.

By-laws of the Irrigation Company of Pomona.

Article 1.

The corporate powers of this company shall be vested in five directors.

Article 2.

353 The officers shall consist of a president, vice-president, treasurer, and secretary, who shall, with the exception of the treasurer and secretary, be chosen by the directors from among themselves.

Article 3.

The annual meeting of the stockholders shall be held in the town of Pomona, county of Los Angeles, on the first Thursday in March of each year, at such place as shall be designated at the office of the company, at which time and place the directors of the company shall be elected by ballot to serve one year or until their successors are elected.

Article 4.

At all meetings of the stockholders each stockholder shall be entitled to as many votes and fractional votes as he holds shares of stock or fractional shares.

Article 5.

A majority of the stock shall constitute a quorum for the transaction of business.

Article 6.

Voting by proxy shall be allowed at meetings of stockholders, but all proxies must be in writing and filed with the secretary at least 24 hour- previous to date of meeting to be used at such meeting.

Article 7.

The board of directors shall, within five days after their election, meet and elect by ballot the officers of the company, but no director shall be eligible to the office of superintendent of the irrigation or zangero.

Article 8.

Vacancies in the board of directors shall be filled by other directors in office.

Article 9.

The directors shall have power to appoint and remove at pleasure all officers and employees of the company, prescribe
354 their duty, and fix their compensation.

Article 10.

It shall be the duty of the board of directors to cause to be kept a record of all their proceedings and acts of all meetings of stockholders, and they shall cause a full and detailed statement to be made at all regular meetings of stockholders showing in full the amount received from sale of water permits and from all other sources and the amount paid out for water distribution and other expenses.

Article 11.

The directors shall meet at least once a month during the months of March and April, May, June, July, August, September, and October of each year, and the president may call special meetings whenever, in his judgment, the interest of the company shall demand it, or whenever requested by two members of the board of directors to call such special meeting being called a reasonable notice must be given.

Article 12.

The directors shall have power and it shall be their duty to fix annually in the month of April, or as soon thereafter as convenient, the water rates to be collected from the actual consumers of water, such rates to be chargeable, if need be, by the board of directors from month to month, but to have a uniform operation in each month upon the consumer according to the amount of the consumption, and no water is furnished until such rates are prepaid. Until such rates are established, the rates of the corresponding month of the previous year shall prevail.

Article 13.

It shall be the duty of the board of directors so to graduate the water rates that no more shall be charged than the estimated
355 amount necessary to cover the expense of distribution, necessary repairs, maintenance.

Article 14.

The president shall preside at all the meetings of the stockholders and directors and shall sign all certificates of stock and shall draw all checks or warrants on the treasury, and he shall see that all officers and employees perform their respective duties faithfully according to these by-laws and such rules and regulations as may be adopted by the board of directors.

Article 15.

The vice-president shall perform the duties of the president in his absence or inability to act.

Article 16.

It shall be the duty of the secretary to keep a record of the proceedings of the board of directors and of the stockholders. He shall keep a book of blank certificates of stock, fill up and countersign all certificates of stock issued, and make the corresponding entries in the margin of the book on such issuance. He shall countersign all checks or warrants drawn on the treasurer by the president. He shall make out all water permits for such stockholders as apply for them, according to their respective interests, provided that he shall first have received water rate- established by the board of directors. He shall at least once a month pay over to the treasurer all moneys received by him for water rates or from any other sources.

Article 17.

The treasurer shall safely keep all moneys received by him and pay same out only on the order of the president, countersigned by the secretary, and shall make a monthly report to the board of directors of all receipts and disbursements.

356 Article 18.

The superintendent of irrigation, together with such assistance as may be allowed him by the board of directors, shall *shall* see that water is punctually delivered to the stockholders entitled to the same.

Article 19.

Excepting the water rates hereinbefore referred to and mentioned, assessment shall never be levied on stock of this company, excepting the board of directors are authorized to levy the same by

a vote of at least two-thirds of all the stock of the corporation cast in favor of such assessment. Notice of meeting of stockholders to call such assessment must be published at least two weeks in advance in every daily and weekly paper that may be published in Pomona at the time — giving such notice.

Article 20.

The stock of the company cannot be transferred except on the transfer of the land on which the water represented by the stock is used, or of a portion of the land, in which latter case so much of the stock as corresponds to the amount of land sold may be transferred.

Article 21.

These by-laws may be repealed or amended or new by-laws adopted as provided by statute. In case the power to repeal and amend the by-laws and adopt new by-laws be delegated to the board of directors they may be repealed or amended or new by-laws adopted by a vote of four directors at any meeting of the board at which all the directors are present, or by a vote of four directors at any meeting of said board, provided notice of such intended action be given to directors at least three days prior to the day of meeting.

357 The above by-laws were adopted at a meeting of the subscribers to the capital stock of the Irrigation Company of Pomona this 20th day of July, 1886.

W. D. GILETTE.
WILLIAM O. SMITH.
H. A. PALMER.
F. L. PALMER.
SAMUEL T. ALEXANDER.

Amendment to By-law.

By-law 20 of the Irrigation Company of Pomona is hereby amended to read as follows:

The stock of this company cannot be transferred except in the transfer of the land on which the water represented by the stock is used, or a portion of the land, in which latter case so much of the stock as corresponds to the amount of land sold may be transferred; provided, however, this corporation may or any of the stockholders may transfer its or their stock to the Pomona Land and Water Company without any transfer of lands; provided further that said Pomona Land and Water Company or its trustees may transfer any of the stock of this company without any transfer of land.

We hereby assent to the adoption of the foregoing amendment to article 20 of the by-laws, and we hereby adopt the same.

SAMUEL T. ALEXANDER, representing 100 shares.
WILLIAM O. SMITH, representing 100 shares.
H. A. PALMER, representing 100 shares.
F. L. PALMER, representing 100 shares.
W. D. GILETTE, representing 100 shares.

July 27th, 1886.

358 EXHIBIT 16.

By-laws of the Del Monte Irrigation Company.

Article 1.—Corporate powers.

Section 1. The corporate powers of this company shall be vested in a board of five directors, and the officers shall be its president, vice-president, secretary, and treasurer.

Article 2.—Election of trustees.

Section 1. At the annual meeting of the stockholders the directors of the company shall be elected by ballot to serve for one year or until their successors are elected. Their term of office shall begin immediately after election.

Article 3.—Meetings.

Section 1. The annual meeting of stockholders shall be held at such place in Pomona as shall be designated and annually thereafter, and special meetings shall be called by the president upon the written request of persons holding a majority of stock sold by the company or upon the request of the board of directors.

See page 10 for amendment.

Section 2. At all meetings of stockholders each stockholder shall be entitled to as many votes as he holds shares.

Section 3. A majority of the subscribed stock shall constitute a quorum for the transaction of business at all meetings of stockholders.

Section 4. The board of directors shall hold their regular meetings quarterly on the third Friday of June, September, December, and March of each year at such place as the board may from time to time fix, and the president may call special meetings whenever the interests of the company shall demand it by giving the members a reasonable notice. At all meetings of the board three members shall constitute a quorum.

359

Section 5. Vacancies in the board of directors shall be filled by other directors in office, and such persons shall hold office until the first regular meeting of the stockholders for the election of officers thereafter.

Section 6. Voting by proxy shall be allowed at meetings of the stockholders, but all proxies must be filed with the secretary at least five days previous to being used at any meeting.

Article 4.—Powers and duties of directors.

Section 1. The directors shall have power to appoint and remove at pleasure all officers, agents, and employees of company, prescribe their duties, fix their compensation, and require from them security for their faithful services when they shall deem it necessary to make such rules and regulations not inconsistent with

the laws of the State of California or the by-laws of the company, for the guidance of the officers and the management of the affairs of the company, as they may find it necessary.

Section 2. The board of directors shall within two weeks after their election meet and elect by ballot the officers of the company. The president and vice-president shall be elected from members of the board, but the secretary and treasurer need not necessarily be either directors or stockholders.

Section 3. It shall be the duty of the board of directors to cause to be kept a record of all their proceedings and acts and the proceedings and acts of all meetings of stockholders, and they shall cause a full statement to be made at all regular meetings of stockholders showing in full and in detail the assets and liabilities
360–369 of the company and generally the condition of affairs. A similar statement shall be made at any special meeting of stockholders when requested by persons holding one-third of the capital stock of the company; they shall supervise all officers and see that their duties are properly performed; they shall cause to be issued to the stockholders, in proportion to their several interests, certificates of stock.

Article 5.—Duties of officers.

Section 1. The president shall preside at all meetings of stockholders and directors. He shall sign all certificates of stock and all contracts and other instruments of writing which have been approved first by the board of directors. He shall draw checks or warrants upon the treasury. He shall see that the acts of the company and its officers conform with the laws of the State of California, and that the by-laws of the company and the rules and regulations adopted by the board of directors are properly carried out by all the officers and employees of the company, and shall discharge such other duties as may be required of him by the by-laws of the board of directors.

Section 2. The vice-president shall perform the duties of the president in his absence or inability to act.

Section 3. It shall be the duty of the secretary to keep a record of the proceedings of the board of directors and of the stockholders. He shall keep a book of blank certificates of stock, fill up and countersign all certificates issued, and make the corresponding entries on the margin of the book on such issuance.

Section 4. The treasurer shall receive and receipt for all monies paid him and shall hold the same subject to order of the board; pay the same out only upon the order of the president, countersigned by the secretary. He shall make a full report to the
370 annual meeting of stockholders of the receipts and disbursements of the company. He shall give bonds, with two or more sureties to be approved by the board of directors, in such sum as shall be fixed by the board for the faithful performance of his duties.

Article 6.—Books and papers.

Section 1. The books and papers of the offices of the secretary and treasurer shall be at all times in business hours subject to the inspection of the board of directors and stockholders.

Article 7.—Stock.

Sections 1. Certificates of stock shall be of such form and device as the board of directors may direct, and each such certificate shall be signed by the president and countersigned by the secretary and express on its face its number, date of issuance, and the number of shares for which and the person to whom it is issued.

Article 8.—Miscellaneous.

Section 1. A majority of stock represented at any meeting of stockholders shall be sufficient to elect officers or decide affirmatively any vote taken.

Section 2. These by-laws may be amended as provided by the civil code.

The undersigned, stockholders of the Del Monte Irrigation Company, hereby consents to and adopts the above and preceding as the by-laws of the Del Monte Irrigation Company this 13th day of April, 1887.

H. A. PALMER.
B. S. NICHOLS.
P. C. TONNER.
H. E. STODDARD.
F. L. PALMER.

371 Article 9.—Transfer of stock.

The stock of the company cannot be transferred except on the transfer of the land on which the water represented by the stock is used, or of a portion of the lands, in which latter case so much of the stock as corresponds to the amount of land sold may be transferred: Provided, however, this corporation may or any of its stockholders may transfer it or their stock to the Pomona Land and Water Company or to a trustee for the benefit of the Pomona Land and Water Company without any transfer of land, and further that said Pomona Land and Water Company or its trustee may transfer any of the stock of this company without any transfer of land.

We hereby assent to the adoption of the foregoing article 9 of the by-laws of the Del Monte Irrigation Company concerning transfer of stock, and we do hereby adopt the same.

H. A. PALMER, representing 100 shares.
B. S. NICHOLS, representing 100 shares.
P. C. TONNER, representing 100 shares.
H. E. STODDARD, representing 100 shares.
F. L. PALMER, representing 100 shares.

Pomona, April 14th, 1887.

Amendment Adopted March 30th, 1888.

Article 3.—Meetings.

Section 1. The annual meeting of stockholders shall be held at the office of the secretary on the last Friday of March of each year, and special meetings shall be called by the president upon the written request of the board of directors.

372 EXHIBIT 17.

By-laws of the Palomares Irrigation Company.

Article 1.—Corporate powers.

Section 1. The corporate powers of this company shall be vested in a board of five directors, and other officers shall be its president, vice-president, secretary, and treasurer.

Article 2.—Election of its trustees.

Section 1. At the annual meeting of stockholders the directors of the company shall be elected by ballot to serve for one year or until their successors are elected. Their term of office shall begin immediately after election.

Article 3.—Meetings.

Section 1. The annual meetings of stockholders shall be held at such place in Pomona as shall be designated and annually thereafter, and special meetings shall be called by the president upon the written request of persons holding a majority of the stock sold by the company or upon the request of the board of directors.

Section 2. At all meetings of the stockholders each stockholder shall be entitled to as many votes as he holds shares.

Section 3. A majority of the subscribed stock shall constitute a quorum for the transaction of business at all meetings of stockholders.

Section 4. The board of directors shall hold their regular meetings quarterly on the third Friday of June, September, December, and March of each year at such place as the board may from time to time fix, and the president may call special meetings whenever the interests of the company shall demand it by giving the mem-
373 bers a reasonable notice. At all meetings of the board a majority of the members shall constitute a quorum.

Section 5. Vacancies in the board of directors shall be filled by the other directors in office, and such persons shall hold office until the first regular meeting of stockholders for the election of officers thereafter.

Section 6. Voting by proxy shall be allowed at meeting of stockholders, but all proxies must be filed with the secretary at least five days previous to being used at any meeting.

Article 4.—Powers and duties of directors.

Section 1. The directors shall have power to appoint and remove at pleasure all officers, agents, and employees of the company, prescribe their duties and fix their compensation, and require from them security for their faithful services when they shall deem it necessary, — to take such rule- and regulations not inconsistent with the laws of the State of California or the laws of the company for the guidance of the officers and the management of the affairs of the company as they may find necessary.

Section 2. The board of directors shall, within two weeks after their election, meet and elect by ballot the officers of the company from members of the board, but the secretary and treasurer need not necessarily be either directors or stockholders.

Section 3. It shall be the duty of the board of directors to cause to be kept a record of all their proceedings and acts and the proceedings and acts of all meetings of stockholders, and they shall *call* a full statement to be made at *att* regular meetings of the stockholders, showing in full and in detail the assets and liabilities of the company and generally the condition of affairs. A similar state-
374 ment shall be made at any special meeting of stockholders when requested by persons holding one-third of the capital stock of the company. They shall supervise all officers and see that their duties are properly performed. They shall cause to be issued to the stockholders, in proportion to their several interests, certificates of stock.

Article 5.—Duties of officers.

Section 1. The president shall preside at all meetings of stockholders and directors. He shall sign all certificates of stock and all contracts, other instruments of writing which have been approved first by the board of directors. He shall draw all checks or warrants on the treasurer. He shall see that the acts of the company and its officers conform with the laws of State of California and that the by-laws of the company and the rules and regulations adopted by the board of directors are properly carried out by all the officers and employees of the company; shall discharge such other duties as may be required of him by the by-laws of the board of directors.

Section 2. The vice-president shall perform the duties of the president in his absence or inability to act.

Section 3. It shall be the duty of the secretary to keep a record of the proceedings of the board of directors and of the stockholders. He shall keep a book of blank certificates of stock, fill up and countersign all certificates issued, and make the corresponding entries on the margin of the book of such issuance.

Section 4. The treasurer shall receive and receipt for all moneys paid him and shall hold the same subject to the order of the board, paying the same out only upon the order of the president,
375 countersigned by the secretary. He shall make full report to the annual meeting of the stockholders of the receipts and

disbursements of the company. He shall give bonds, with two or more sureties, to be approved by the board of directors, in such sum as shall be fixed by the board for the faithful performance of his duties.

Articles 6.—Books and papers.

Section 1. The books and papers of the offices of the secretary and treasurer shall be at all times in business hours subject to the inspection of the board of directors and of any of the stockholders.

Article 7.—Stock.

Section 1. Certificates of stock shall be of such form and device as the board of directors may direct, and each such certificate shall be signed by the president and countersigned by the secretary and express on its face its number, date of issuance, and the number of shares for which and the person to whom it is issued.

Article 8.—Miscellaneous.

Section 1. A majority of stock represented at any meeting of stockholders shall be sufficient to elect officers or decide affirmatively any vote affirmatively taken.

Section 2. These by-laws may be amended as provided by civil code.

The undersigned, stockholders of the Palomares Irrigation Company, consent to and adopt the above and preceding as the by-laws of the Palomares Irrigation Company this 13th day of April, 1887.

H. A. PALMER.
B. S. NICHOLS.
P. C. TONNER.
H. E. STODDARD.
F. L. PALMER.

376 Article 9.—Transfer of stock.

The stock of this company cannot be transferred except on the transfer of land on which the water represented by the stock is used, or a portion of the land, in which latter case so much of the stock as corresponds to the amount of land sold may be transferred.

Provided, however, this corporation may or any of its stockholders may transfer its or their stock to the Pomona Land and Water Company or to a trustee for the benefit of the Pomona Land and Water Company without any transfer of lands; and provided further that said Pomona Land and Water Company or its trustees may transfer any of the stock of this company without any transfer of lands.

We hereby assent to the adoption of the foregoing article 9 of the

by-laws of the Palomares Irrigation Company concerning the transfer of stock, and we do hereby adopt the same.

H. A. PALMER, representing 100 shares.
B. S. NICHOLS, representing 100 shares.
P. C. TONNER, representing 100 shares.
H. E. STODDARD, representing 100 shares.
F. L. PALMER, representing 100 shares.

Pomona, April 14th, 1887.

(Here follows map marked pp. 377 & 378.)

379 EXHIBIT 19.

(*Resolution Referred to in Annexed Deed.*)

OFFICE OF THE POMONA LAND AND WATER COMPANY,
SAN FRANCISCO, CALIFORNIA, *September 5th*, 1884.

Resolved, That *that* the Pomona Land and Water —, a corporation formed under the laws of the State of California, will sell to Charles W. Brown, of Los Angeles county, California, for the sum of six hundred and twenty-five dollars, United States gold coin, all that real property situate in the county of Los Angeles, State of California, described as follows, to wit: Lot (4) four of block one hundred and eighty-five (185) of the Pomona tract, according to map of said tract, duly recorded — Book 3, pp. 90 & 91, of miscellaneous records of Los Angeles county, estimated to contain five (5) acres of land.

Said land having the following water right: An amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture, to each ten acres of land, and a proportionate amount for each fraction thereof; said water to be delivered from the aqueducts of the company in heads of not less than twenty-five inches and within one-fourth of a mile of said land. The party of the first part reserves the right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

Said water right shall be subject to an annual charge for repairs of pipes and aqueducts and expense of distribution. Said
380 water right is to be exchanged by the purchaser for water stock of a corresponding value in a water company to be organized and its stock to be issued on or before the first day of August, eighteen hundred and eighty-six; and H. A. Palmer, president, and C. K. Clark, secretary, of said corporation are hereby directed to execute, acknowledge, and deliver in and with the name and seal of said corporation a conveyance to said Charles W. Brown of the real property and water rights hereinbefore described.

I hereby certify the foregoing to be a true copy of a resolution duly adopted by the board of directors of the Pomona Land and

Water Company at a meeting held on the fifth day of September, A. D. 1884, quorum being present.

In witness whereof I have hereunto set my hand and affixed the corporate seal of said corporation the day and year first above written.

[CORPORATE SEAL.] CHAS. K. CLARK,
Secretary of the Pomona Land and Water Company.

Whereas, the said Pomona Land and Water Company, a corporation, duly organized, by its board of trustees has, by the foregoing resolution, (which is hereby referred to and made part hereof) duly authorized and directed its president and secretary to convey to the party of the second part hereto the piece of land and its water right as per copy in said resolution and hereinbefore particularly described.

Now this indenture, made the fifth day of September in the year one thousand eight hundred and eighty-four between the Pomona Land and Water Company, a corporation duly organized
381 under the laws of the State of California, having its office and principal place of business at San Francisco, in the State of California, the party of the first part and Charles W. Brown of Los Angeles county California the party of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of six hundred and twenty-five dollars, gold coin of the United States, to it the said corporation, paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and confirmed, and by these presents does grant, bargain, sell and confirm unto the said party of the second part and to his heirs and assigns forever, all that certain piece or parcel of land, together with the water rights described in the copy of the resolution prefixed, which said resolution is hereby referred to for further description, and make a part of this deed.

To have and to hold the above-described premises and water rights, together with the appertenances, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the Pomona Land and Water Company, the party of the first part hereto, by the resolution aforesaid, has hereunto caused to be set its name and corporate seal, and these presents to be executed by its president and secretary, this fifth day of September 1884.

[CORPORATE SEAL.] POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,
By CHAS. K. CLARK, *Secretary*.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

382 On this fifth day of September, A. D. 1884, before me, J. F. Kingswell, a notary public in and for the city and county of San Francisco, personally appeared H. A. Palmer, known to me to be the president, and Charles K. Clark, known to me to be the secre-

tary, of the Pomona Land and Water Company, the corporation that executed the within instrument, and they severally acknowledged to me that such corporation executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the city and county of San Francisco, the day and year in this certificate first above written.

[SEAL.] J. F. KINGSWELL,
Notary Public.

383 EXHIBIT 20.

Resolution Referred to in the Annexed Deed.

OFFICE OF THE POMONA LAND AND WATER COMPANY,
SAN FRANCISCO, CALIFORNIA, *June 10th*, 1885.

Resolved, That the Pomona Land and Water Company, a corporation formed under the laws of the State of California, will sell to Alfred H. Smith, of the Kingdom of Hawaii, for the sum of four thousand and six and $\frac{90}{100}$ dollars, United States gold coin, all that real property situate in the county of Los Angeles, State of California, described as follows, to wit: Lots five and six (5 & 6) of the northeast Pomona tract, according to map of said tract duly recorded in Book 5, page 461, of miscellaneous records of Los Angeles county, estimated to contain 47.14 acres of lands, said land having the following water right: An amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture, to each ten acres of land, and a proportionate amount for each fraction thereof, said water to be delivered from the aqueducts of the company in heads of not less than twenty-five inches and within one-fourth of a mile of said lands, and the amount to be subject to reasonable deductions in time of scarcity.

The party of the first part reserves the right of way for laying papes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same; said water right shall be subject to an annual charge for repairs of pipes and aqueducts and expenses of distribution.

384 Said water right is to be exchanged by the purchaser for water stock of a corresponding value in a water company to be organized and its stock to be issued on or before the first day of August, eighteen hundred and eighty-eight, and H. A. Palmer, president (W. K. B.), C. K. Clark, secretary, of said corporation, are hereby directed to execute, acknowledge, and deliver in and with the name and seal of said corporation a conveyance to said Alfred H. Smith of the real property and water rights hereinbefore described.

I hereby certify the foregoing to be a true copy of a resolution duly adopted by the board of directors of the Pomona Land and Water Company at a meeting held on the tenth day of June, A. D. 1885, a quorum being present.

In witness whereof I have hereunto set my hand and affixed the

corporate seal of said corporation the day and year first above written.

[Corporate Seal of P. L. & W. Co.]

CHAS. K. CLARK,
Secretary of the Pomona Land and Water Company.

Whereas, the said Pomona Land and Water Company, a corporation duly organized, by its board of trustees, has, by the foregoing resolution, (which is hereby referred to and made part hereof) duly authorized and directed its president and secretary to convey to the party of the second part hereto, the piece of land and its water right, as per copy in said resolution, and hereinbefore particularly described.

Now, this indenture, made the 10th day of June, in the year one thousand eight hundred and eighty-five, between the Pomona Land and Water Company, a corporation duly organized under the
385 laws of the State of California, having its office and principal place of business at San Francisco, in the State of California, the party of the first part, and Alfred H. Smith, of Kingdom of Hawaii, the party of the second part, witnesseth: that the said party of the first part, for and in consideration of the sum of four thousand and six and $\frac{00}{100}$ dollars, gold coin of the United States to it the said corporation, paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and confirmed, and by these presents does grant, bargain, sell and confirm, unto the said party of the second part, and to his heirs and assigns forever, all those certain pieces or parcels of land, together with the water rights described in the copy of the resolution prefixed, which said resolution is hereby referred to for further description, and made a part of this deed. To have and to hold the above-described premises and water rights, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the Pomona Land and Water Company, the party of the first part, hereto, by the resolution aforesaid, has hereunto caused to be set its name and corporate seal, and these presents to be executed by its president and secretary, this 10th day of June 1885.

[P. L. & W. Co. Corporate Seal.]

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,
By CHAS. K. CLARK, *Secretary*.

STATE OF CALIFORNIA, } *ss:*
County of Alameda, }

On this eleventh day of June, A. D. 1885, before me, W. K.
386 Rowell, a notary public in and for the county of Alameda, personally appeared H. A. Palmer, known to me to be the president, and Chas. K. Clark, known to me to be the secretary, of

the Pomona Land and Water Company, the corporation that executed the within instrument, and they severally acknowledged to me that such corporation executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.

[SEAL.] W. K. ROWELL,
Notary Public.

A full, true, and correct copy of the original recorded, at request of J. T. Taylor, 18th day of June, 1885, at 24 min. past 2 o'clock p. m.

CHARLES E. MILES,
County Recorder,
By JOHN M. BALDWIN, *Deputy.*

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

I hereby certify the foregoing to be a full, true, and correct copy of the instrument appearing recorded in Book No. 140 of Deeds, page 126, records of Los Angeles county, and that I have carefully compared the same with the original record.

In witness whereof I have hereunto set my
[IMPRESSED SEAL.] hand and affixed my official seal this 31st day of March, 1890.

JOHN W. FRANCIS,
County Recorder.

387 *Resolution Referred to in the Annexed Deed.*

OFFICE OF THE POMONA LAND AND WATER COMPANY,
SAN FRANCISCO, CALIFORNIA, *March 12th*, 1887.

Resolved, That the Pomona Land and Water Company, a corporation formed under the laws of the State of California, will sell to W. B. Stewart, John R. Weir, T. N. Canfield, and R. S. Bassett, for the sum of seventeen hundred and fifty dollars, United States gold coin, all that real property situate in the county of Los Angeles, State of California, described as follows, to wit: Beginning at the point where the center line of San Bernardino avenue intersects the east boundary of the Ranche San José, thence westerly along the center line of San Bernardino avenue 1,031.8 feet to a stake; thence southerly and parallel with Alexander avenue 589.75 feet to a stake; thence easterly on a line parallel with the center line of San Bernardino avenue 815 feet to the east boundary of the Ranche San José; thence northeasterly, following said boundary line, 628.3 feet to the point of beginning, containing twelve and one-half (12½) acres of land and being a portion of lot 25, northeast Pomona tract, according to map of said tract, duly recorded in Book 5, p. 461, miscellaneous records of Los Angeles county, California, with the following water right: An amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture,

to each ten acres of land and a proportionate amount for each fraction thereof, said water to be delivered from the aqueducts of the company in heads of not less than twenty-five inches and within one-fourth of a mile of said land, and the amount to be subject to reasonable deductions in time of scarcity arising from causes beyond the control of the Pomona Land and Water Company.

388 The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said land and make necessary excavations for laying pipes and aqueducts and to inspect, repair, replace, and control the same. Said water right shall be subject to an annual charge for repairs of pipes and aqueducts and expense of distribution; said water right is to be exchanged by the purchaser for water stock of a corresponding value in a water company to be organized and its stock to be issued on or before August 1st, 1888.

And H. A. Palmer, president, and C. K. Clark, secretary, of said corporation, are hereby directed to execute, acknowledge, and deliver in and with the name and seal of said corporation a conveyance to W. B. Stewart, John R. Weir, T. N. Camfield, and R. S. Bassett of the real property and water rights hereinbefore described.

I hereby certify the foregoing to be a true copy of a resolution duly adopted by the board of directors of the Pomona Land and Water Company at a meeting held on the 9th day of March, A. D. 1887, a quorum being present.

In witness whereof I have hereunto set my hand and affixed the corporate seal of said corporation the day and year first above written.

[CORPORATE SEAL.] CHAS. K. CLARK,
Secretary of the Pomona Land and Water Company.

Whereas the said Pomona Land and Water Company, a corporation duly organized by its board of trustees has by the foregoing resolution (which is hereby referred to and made a part thereof)

389 duly authorized and directed its president and secretary, to convey to the party of the second part hereto, the piece of land and its water right as per copy in said resolution and hereinbefore particularly described:

Now, this indenture made the 9th day of March in the year one thousand eight hundred and eighty-seven between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, having its office and principal place of business at San Francisco in the State of Calfornia, the party of the first part, and W. B. Stewart, John R. Weir, T. N. Camfield and R. S. Bassett of Los Angeles county, California, the parties of the second part, witnesseth:

That the said party of the first part for and in consideration of the sum of seventeen hundred and fifty $_{100}$ dollars, gold coin of the United States to it the said corporation paid by said parties of the second part, the receipt whereof is hereby acknowledged has granted, bargained, sold and confirmed, and by these presents does grant,

bargain, se-, and confirm unto the said parties of the second part and to their heirs and assigns forever, a- that certain piece or parcel of land, together with the water rights described in the copy of the resolution prefixed, which said resolution is hereby referred to for further description and made a part of this deed.

To have and to hold the above-described premises and water right together with the appurtenances unto the said parties of the second part their heirs and assigns forever.

In witness whereof, the Pomona Land and Water Company, the party of the first part hereto, by the resolution aforesaid, has hereunto caused to be set its name and corporate seal and these presents to be executed by its president and secretary this 9th day of March, 1887.

390 [CORPORATE SEAL.] POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,
By CHAS. K. CLARK, *Secretary*.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On the 12th day of March, A. D. one thousand eight hundred and eighty-seven, before me, James L. King, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Chas. K. Clark, known to me to be the secretary of the Pomona Land and Water Company, the corporation described in and that executed the foregoing instrument, and he duly acknowledged to me that such corporation executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city and county of San Francisco, the day and year last above written.

[NOTARIAL SEAL.] JAMES L. KING,
Notary Public, 308 *California Street, San Francisco*.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

On this 9th day of March, A. D. 1887, before me, J. A. Clark, a notary public in and for the said county of Los Angeles, personally appeared H. A. Palmer, known to me to be the president of
391 the Pomona Land and Water Company, the corporation that executed the within instrument, and he acknowledge- to me that such corporation executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.

[NOTARIAL SEAL.] J. A. CLARK,
Notary Public.

A full, true, and correct copy of the original recorded, at request of R. L. Bassett, Mar. 19th, 1887, at 43 min. past 11 a. m.

FRANK A. GIBSON,
County Recorder,
By N. S. AVERILL, *Deputy*.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

I hereby certify the foregoing to be a full, true, and correct copy of the instrument appearing in Book No. 204 of Deeds, page 479, records of Los Angeles county, and that I have carefully compared the same with the original record.

In witness whereof I have hereunto set my
[OFFICIAL SEAL.] hand and affixed my official seal this 31st day of March, 1890.

JOHN W. FRANCIS,
County Recorder.

Resolution Referred to in the Annexed Deed.

OFFICE OF THE POMONA LAND AND WATER COMPANY,
POMONA, CALIFORNIA, *May 2nd*, 1887.

392 Resolved, That the Pomona Land and Water Company, a corporation formed under the laws of the State of California, will sell to Alfred S. Hartwell, of South Natick, Massachusetts, for the sum of two thousand three hundred and sixty-nine and $\frac{49}{100}$ dollars, United States gold coin, all that real property situate in the county of Los Angeles, State of California, described as follows, to wit: Beginning at the intersection of the center line of Alexander avenue with the south line of lot 21 of the northeast Pomona tract, thence northerly, following the center line of Alexander avenue, 688.15 feet to the south line of tract sold Geo. J. Mitchell; thence westerly, on a line parallel with the south line of said lot 21, 1,390 feet to the west line of lot 30, Loop and Meserve tract; thence southeasterly, following said west line — 30, 688.15 feet to the southwest corner of said lot 30; thence easterly, following the south line of said lot 30 and said lot 21, 1,335.16 feet to the point of beginning, containing 21.54 acres of land and being the most southerly 12.395 acres of lot 21, northeast Pomona tract, and most southerly 9.145 acres of lot 30, Loop and Meserve tract, reference being had to the map of said tracts records respectively in Book 5, p. 461, miscellaneous records, and Book Thirty-four (34) of Deeds, pp. 2, 3, 4, records of Los Angeles county, California, with the following water right: An amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture, to each ten acres of land, and a proportionate amount for each fraction thereof, said water to be delivered from the aqueducts of the county in heads of not less than twenty-five inches and within one-fourth of a mile of said land and the amount to be subject to a reasonable deductions in time of scarcity arising from causes beyond the
393 control of the Pomona Land and Water Company. The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and inspect, repair, replace, and control the same. Said water right sh-ll be subject to an annual charge for re-

pairs of pipes and aqueducts and expense of distribution. Said water right is to be exchanged by the purchaser for water stock of a corresponding value in the Del Monte Irrigation Company, a corporation duly incorporated Feb'y 21st, 1887. All water and water rights coming from the San Antonio cañon are hereby specially reserved, and H. A. Palmer, president, and F. L. Palmer, secretary, of said corporation are hereby directed to execute, acknowledge, and deliver in and with the name and seal of said corporation a conveyance to said Alfred S. Hartwell of the real property and water rights hereinafter described. I hereby certify the foregoing to be a true copy of a resolution duly adopted by the board of directors of the Pomona Land and Water Company at a meeting held on the second day of May, A. D. 1887, a quorum being present.

In witness whereof I have hereunto set my hand and affixed the corporate seal of said corporation the day and year first above written.

[CORPORATE SEAL.] F. L. PALMER,
Secretary of the Pomona Land and Water Company.

Whereas, the said Pomona Land and Water Company, a corporation duly organized by its board of trustees, has by the foregoing resolution (which is hereby referred to and made part hereof)
394 duly authorized and directed its president and secretary to convey to the party of the second part hereto, the piece of land and its water right as per copy in said resolution and hereinbefore particularly described.

Now, this indenture made the 2nd day of May in the year one thousand eight hundred and eighty-seven, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, having its office and principal place of business at San Francisco in the State of California, the party of the first part and Alfred S. Hartwell of South Natick Massachusetts, the party of the second part, witnesseth: That the said party of the first part for and in consideration of the sum of two thousand three hundred and sixty-nine $\$\,^{42}_{100}$ dollars gold coin of the United States, to it the said corporation paid by the said party of the second part the receipt whereof is hereby acknowledged has granted, bargained, sold and confirmed and by these presents does grant, bargain, sell and confirm unto the said party of the second part and to his heirs and assigns forever, all that certain piece or parcel of land, together with the water rights described in the copy of the resolution prefixed, which said resolution is hereby referred — for further consideration and made a part of this deed.

To have and to hold the above-described premises and water rights together with the appurtenances unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the Pomona Land and Water Company, the party of the forst part hereto by the resolution aforesaid has hereunto caused to be set its name and corporate seal and these presents

to be executed by its president and secretary this second day of May, 1887.

[CORPORATE SEAL.] POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,
By F. L. PALMER, *Secretary*.

395 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

On this 3rd day of May, A. D. 1887, before me, J. A. Clarke, a notary public in and for the county of Los Angeles, personally appeared H. A. Palmer, known to me to be the president, and F. L. Palmer, known to me to be the secretary, of the Pomona Land and Water Company, the corporation that executed the within instrument, and they severally acknowledge- to me that such corporation executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.

[NOTARIAL SEAL.] J. A. CLARKE,
Notary Public.

A full, true, and correct copy of the original recorded, at the request of Pomona Land and Water Company, May 5th, 1887, at 12 min. past 10 a. m.

FRANK A. GIBSON,
County Recorder,
By JNO. TORREY, JR., *Deputy*.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

I hereby certify the foregoing to be a full, true, and correct copy of the instrument appearing recorded in Book No. 215 of Deeds, page 252, records of Los Angeles county, and that I have carefully compared the same with the original record.

In witness whereof I have hereunto set my hand and affixed my official seal this 31st day of March, 1890.

[OFFICIAL SEAL.] JOHN W. FRANCIS,
County Recorder.

396 *Resolution Referred to in the Annexed Deed.*

OFFICE OF THE POMONA LAND AND WATER COMPANY,
SAN FRANCISCO, CALIFORNIA, *December 14th*, 1887.

Resolved, That the Pomona Land and Water Company, a corporation formed under the laws of the State of California, will sell to Stephen L. Dodge, of Los Angeles county, California, for the sum of seven hundred and ninety-eight $\frac{45}{100}$ dollars, United States gold coin, all that real property situate in the county of Los Angeles, State of California, described as follows, to wit: Beginning at the southeast corner of lot 200 of the Pomona tract, in the center of Holt avenue,

thence northerly along the eastern line of said lot 200 601 feet to a stake on the northern boundary of the Pomona tract, thence westerly along the northern boundary of the Pomona tract 490 feet to a stake, thence southerly 618 feet to the center of Holt avenue, thence easterly along the said center line of Holt avenue 503 feet to the point of beginning, containing six & $\frac{943}{1000}$ acres, and being a portion of block two hundred (200) of the Pomona tract, reference being had to the map of said tract, duly recorded in Book 3, pp. 96 & 97, miscellaneous records of Los Angeles county, California.

With the following water right: An amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture, to each ten acres of land and a proportionate amount for each fraction thereof, said water to be delivered from the aqueducts of the company in heads of not less than twenty-five inches and within one-fourth of a mile of said land, and the amount to be subject to reasonable deductions in time of scarcity arising from causes beyond the control of the Pomona Land and Water Company.

397

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts and to inspect, repair, replace, and control the same.

Said water right shall be subject to an annual charge for repairs of pipes and aqueducts and expense of distribution. Said water right is to be exchanged by the purchaser for water stock of corresponding value in the Palomares Irrigation Company, a corporation duly organized February 21st, 1887, and B. S. Nichols, president, and F. L. Palmer, secretary, of said corporation, are hereby directed to execute, acknowledge, and deliver in and with the name and seal of said corporation a conveyance to said Stephen L. Dodge of the real property and water rights hereinbefore described.

I hereby certify the foregoing to be a true copy of a resolution duly adopted by the board of directors of the Pomona Land and Water Company at a meeting held on the 14th day of December, A. D. 1887, a quorum being present.

In witness whereof I have hereunto set my hand and affixed the corporate seal of said corporation the day and year first above written.

[CORPORATE SEAL.] F. L. PALMER,
Secretary of the Pomona Land and Water Company.

Whereas the Pomona Land and Water Company, a corporation duly organized by its board of trustees has by the foregoing resolution (which is hereby referred to and made part hereof) duly authorized and directed its president and secretary to — the party of the second part hereto the piece of land and its water right as per copy in said resolution and hereinbefore particularly described. Now this indenture made the 14th day of December in the year one thousand eight hundred and eighty-seven between the Pomona Land and Water Company, a cor-

398

poration duly organized under the laws of the State of California, having its office and principal place of business at San Francisco in the State of California, the party of the first part and Stephen L. Dodge of Los Angeles county, California, the party of the second part, witnesseth: that the said party of the first part for and in consideration of the sum of seven hundred and ninety-eight $\frac{45}{100}$ dollars gold coin of the United States, to it the said corporation paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and confirmed and by these presents does grant, bargain, sell and confirm unto the said party of the second part and to his heirs and assigns forever, all that certain piece or parcel of land, together with the water rights described in the copy of the resolution prefixed which said resolution is hereby referred to for further description and made a part of this deed.

To have and to hold the above-described premises and water rights, together with the appurtenances unto the said party of the second part his heirs and assigns forever.

In witness whereof the said Pomona Land and Water Company, the party of the first part hereto by the resolution aforesaid has hereunto caused to be set its name and corporate seal and these presents to be executed by its president and secretary this 14th day of December, 1887.

[CORPORATE SEAL.] POMONA LAND AND WATER COMPANY,
By B. S. NICHOLS, *President*,
By F. L. PALMER, *Secretary*.

399 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

On this sixteenth day of December, A. D. 1887, before me, J. E. McComas, a notary public in and for the said county of Los Angeles, personally appeared B. S. Nichols, known to me to be the president, and F. L. Palmer, known to me to be the secretary, of the Pomona Land and Water Company, the corporation that executed the within instrument, and they severally acknowledge to me that such corporation executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.

[NOTARIAL SEAL.] J. E. McCOMAS,
Notary Public.

A full, true, and correct copy of the original recorded, at request of grantee, Mar. 26th, 1888, at 40 min. past 4 p. m.

FRANK A. GIBSON,
County Recorder,
By FRANK H. WHITE, *Deputy*.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

I hereby certify the foregoing to be a full, true, and correct copy of the instrument appearing recorded in Book No. 405, page 221,

records of Los Angeles county, and that I have carefully compared the same with the original record.

In witness whereof I have hereunto set my [OFFICIAL SEAL.] hand and affixed my official seal this 31st day of March, 1890.

JOHN W. FRANCIS,
County Recorder.

There were eighteen other deeds of similar form.

400 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

I, J. W. McKinley, do hereby certify that I am presiding judge of department number six of the superior court of Los Angeles county, California, and do further certify that the attestation to each of the copies of deeds hereto annexed, the same being copies of deeds appearing upon the records of deeds of said county in Book 7, at page 18; in Book 83, at page 263; in Book 107, at page 419; in Book 140, at page 126; in Book 144, at page 105; in Book 153, at page 283; in Book 158, at page 2; in Book 158, at page 160; in Book 158, at page 328; in Book 158, at page 331; in Book 159, at page 313; in Book 169, at page 534; in Book 173, at page 138; in Book 180, at page 288; in Book 184, at page 574; in Book 194, at page 554; in Book 200, at page 431; in Book 201, at page 186; in Book 201, at page 409; in Book 201, at page 572; in Book 204, at page 479; in Book 215, at page 252; in Book 216, at page 532; in Book 217, at page 390; in Book 226, at page 226; in Book 227, at page 19; in Book 236, at page 281; in Book 238, at page 312; in Book 266, at page 288; in Book 355, at page 111; in Book 365, at page 286; in Book 405, at page 221; in Book 408, at page 55; in Book 512, at page 88; in Book 519, at page 264; in Book 519, at page 267; in Book 528, at page 211; in Book 575, at page 8; in Book 593, at page 143; in Book 626, at page 81, and in Book 639, at page 52, respectively, is in due form and made by the proper officer, and that each of the instruments, of which the annexed purport to be copies, conforms to the laws of the State of California and is
401 entitled by said laws to record in said office.

J. W. McKINLEY, *Judge.*

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

I, C. H. Dunsmoor, do hereby certify that J. W. McKinley, whose name is signed to the annexed certificate, was at the time of signing the same duly commissioned, qualified, and acting as presiding judge of department number six of the superior court of the county of Los Angeles, State of California, and I further certify that his signature thereto is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of said superior court this 8th day of April, A. D. 1890.

[OFFICIAL SEAL.] C. H. DUNSMOOR,
County Clerk and ex Officio Clerk of the Superior Court of Los Angeles County, California.

Exhibit 21.

This contract entered into this 31st day of July 1886 between the Irrigation Company of Pomona a corporation, the party of the first part and the Pomona Land and Water Company, a corporation, the party of the second part, witnesseth,

That the said party of the first part for and in consideration of the sum of five dollars lawful money acknowledge-, and for the further consideration that the party of the second part did by deed dated July 27th 1886 sell, assign and transfer to the party of
402 the first part one hundred and fifty-one inches of water in the township of San José, county of Los Angeles State of California agrees to have issued and transferred to F. L. Palmer as trustee for the party of the second part fourteen thousand six hundred shares of its capital stock (500 shares having already issued to the original incorporators for the purpose of incorporating) that the shares so issued and transferred may be again transferred to such person or persons as may be entitled to the same on account of water rights sold by the party of the second part on account of sale hereafter to be made by said party. In case of the death or resignation of said trustee the trustee herein named shall devolve upon such successor as the Pomona Land and Water Company shall nominate.

The party of the first part further agrees to and with the party of the second part to cause to be issued and transferred to the said F. L. Palmer as trustee for said second party one hundred additional shares of its capital stock for each additional inch of water miner measurement under four-inch pressure which the party of the second part shall sell and deliver to the party of the first part.

The party of the first part further agrees to and with the party of the second part that it the said first party will cause the water hereinbefore referred to to be delivered to the person or persons lawfully entitled to the same at its own proper charge and without expense whatever to the party of the second part.

In witness whereof the Irrigation Company of Pomona the party of the first part has hereunto caused to be set its name and corporate seal and these presents to be executed by its president and secretary thereto authorized this 31st day of July, 1886.

403 IRRIGATION COMPANY OF POMONA,
[SEAL.] By H. A. PALMER, *President*,
By F. L. PALMER, *Secretary*.

In witness whereof the Pomona Land and Water Company, the party of the second part hereto, has hereunto caused to be set its name and corporate seal, and these presents executed by its president and secretary thereto authorized this eleventh day of August, A. D. 1886.

POMONA LAND AND WATER COMPANY,
[SEAL.] By H. A. PALMER, *President*,
By CHAS. K. CLARK, *Secretary*.

EXHIBIT 22.

(65 shares.) Incorporated July 16th, 1886. No. 137.

Irrigation Company of Pomona.

Capital stock $245,000; 24,500 shares, $10 each.

POMONA, CAL., *July 24th*, 1889.

This certifies that H. M. Loud is the holder of sixty-five shares of the capital stock of the Irrigation Company of Pomona. This certificate and interest in the capital stock represented thereby is transferable upon the books of the corporation under the following conditions only:

First. Endorsement upon the back of this certificate and its surrender to the corporation; second, in accordance with the conditions and limitations of article XX of its by-laws providing for the cotemporaneous transfer by the holder of this stock of land upon which the water represented by this certificate of stock is used. See copy of the by-laws upon the back of this certificate.

[SEAL.] B. S. NICHOLS, *President.*

F. L. PALMER, *Secretary.*

Endorced on back of certificate:

Extract from the By-laws of the Irrigation Company of Pomona.

Article XX.

The stock of the company cannot be transferred except on
404 the transfer of the land on which the water represented by the stock is used, or a portion of the land, in which latter case so much of the stock as corresponds to the amount of land sold may be transferred.

Having sold and transferred to —— —— the land upon which the water represented by this certificate of stock is used, for value received, I hereby sell, assign, and transfer to —— —— the number of shares of capital stock represented by the within certificate.

—— ——.

EXHIBIT 23.

This agreement, made this 16th day of November, A. D. 1886, between the Pomona Land and Water Company, a corporation, the party of the first part, and William Thomas and Wendell Easton, of the city and county of San Francisco, State of California, the parties of the second part, witnesseth:

That the said party of the first part hereby authorizes and employes the said parties of the second part to sell for its account the real estate situate in the counties of Los Angeles and San Bernardino State *od* California and fully described in Schedule "A" annexed hereto, and hereby constitutes and appoints said parties of the second part its sole agents for such purpose.

The limit or lowest price at which said real estate shall be sold by said parties of the second part shall be the price set opposite the respective descriptions of said real estate in said Schedule "A." But nothing herein contained shall prevent said party of the first
405 part from selling any piece below schedule rates; in which case said parties of the second part shall become entitled to 5 per cent. commission on the price actually realized.

The terms of sale shall be one-quarter cash; balance in one, two or three years, bearing interest at the rate of eight (8) per cent. per annum, and secured by mortgage on the property, or by the form of agreements annexed hereto and marked Exhibits "C" and "D."

And the said party of the first part further agrees that upon the first payment for any of said parcels of land which may lie within Pomona tract and Phillip's addition, it will execute an agreement in the form prescribed in said Exhibit "D." That upon the first payment for any of said parcels of land within the town of Pomona, it will execute the requisite conveyance to carry title to the same, receiving back a mortgage for the deferred payments. That upon the first payment for any of said parcels of land within the Pomona tract, it will execute an agreement in the form prescribed in said Exhibit "D." That upon the first payment for any of said other parcels, it will execute, at the option of the purchaser of any of said parcels, either the form of agreement marked Exhibit "C," or a grant, bargain and sale deed to the land, receiving back a mortgage for the deferred payments, said deed to contain a provision in regard to water rights similar to that contained in the last thirteen lines on the first page of said Exhibit "C."

The said parties of the second part shall be the sole judges as to the amount of deposit to be required from purchasers to bind any sales.

In consideration of the premises, the said party of the first part agrees to allow and to pay to the said parties of the second
406 part, as commission, five (5) per cent. of the prices set forth in Schedule "A," and also one-half of all excess realized over said limit price upon any sale of said land negotiated during the existence of this agreement whether negotiated by said parties of the second part, or any other person or persons. The said commission of five (5) per cent. shall be paid to said parties of the second part out of the first payment made by purchasers, and the one-half of all excess realized over the limit price shall be paid to the said parties of the second part upon the second payment made by purchasers, provided that said one-half of all excess shall not exceed fifty (50) per cent. of such second payment. If said one-half of all excess shall exceed fifty (50) per cent. of such second payment, the amount by which it so exceeds said fifty (50) per cent. shall be paid to said parties of the second part upon the third payment made by purchasers. All deferred payments to the parties of the second part shall bear the same rate of interest as is received net by the said party of the second part.

And whereas the party of the first part is the owner of certain real estate in said counties of Los Angeles and San Bernardino, State

of California, described in Schedule B, which lands as yet have no facilities for irrigation; and

Whereas, it is the intention of said party of the first part to proceed to develop water for the purpose — irrigating as far as possible said lands:

It is hereby agreed that upon the development of such water, such of the lands as shall be irrigated by such future developments, shall fall within the provisions of this contract at schedule rates to be hereafter fixed by the parties hereto on a basis which will secure the prompt sale thereof.

In case of disagreement between the parties hereto as to
407 the price to be placed upon such lands, W. J. Curtis or his appointee, shall act as umpire in regard to such prices and his decision shall be binding and final, but such prices shall not be less than the cost of said land and cost of developing water thereon.

Nothing herein contained shall be construed in such manner as to compel said party of the first part to develop water at any specified rate, or in any specified amount, or within any particular time; said question of development being left entirely to the discretion of said party of the first part.

Said parties of the second part are authorized to allow to any person applying to purchase any of said property, a reasonable time to examine the title thereto, and to give to such person a receipt for the deposit made, with the condition that if the title is defective and the defect cannot be cured within a reasonable time, the deposit will be returned.

Said party of the first part further agrees to furnish to said parties of the second part an abstract of title to all its property complete up to the date of the execution of these presents, and all such advertising matter as the said party of the first part may now have on hand.

Said party of the first part further agrees to allow to said parties of the second part, or such representatives as they may select, deskroom in any office which the said party of the first part may have in Pomona and such use of the conveyances and horses owned by said party of the first part in Pomona, as may not be inconsistent with their use by the general officers of the company.

The parties of the second part, upon the request of the party of the first part, shall, from time to time during the continu-
408 ance of this contract, give to the party of the first part copies of all the schedules of prices at which the parties of the second part are offering any of said lands for sale. And said parties of the second part shall, at all times, give the party of the first part due notice in writing of any changes made in any of said schedules, stating the nature of such changes.

And the said parties of the second part in consideration of the agency hereinbefore given to them and of the premises agree to use their best endeavors to effect a quick sale of all the properties set forth in Schedule "A" and "B" as far as possible to actual settlers, and at their own cost to do such advertising and to take all such steps

as may seem to them to be necessary to attract the attention of persons contemplating the purchase of lands in southern California.

This agreement shall continue for the term of two years from the date hereof.

In witness whereof, the parties have hereunto set their hands and seals in duplicate, this 16th day of November A. D. 1866, said party of the first part by its president and secretary thereunto duly authorized.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,
By CHAS. K. CLARK, *Secretary*.
WENDELL EASTON.
WILLIAM THOMAS.

Schedules A and B referred to in annexed Exhibit 23 cover lands in question in this suit and other lands, with prices.

409 EXHIBIT C (PART OF EXHIBIT 23).

Office of the Pomona Land and Water Company.

This agreement made the — day of —— 188–, between the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California and having its office and principal place of business in the city and county of San Francisco California, party of the first part, —— —— part- of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted —— — A. D. 188–, and in consideration of — dollars paid by the part- of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the part- of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the part- of the second part, h- heirs or assigns, the following-described real property, situated in the county —— State of California, to wit: Estimated to contain — acres. Said land having the following water right, an amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture to each ten acres of land and a proportionate amount for each fraction thereof, said water to be delivered from the aqueducts of the company in heads of not less than twenty-five inches and within — of said land
410 and the amount to be subject to reasonable deductions in times of scarcity arising from causes beyond the control of the Pomona Land and Water Company.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace and control the same. Said water right shall be subject to an annual charge for repairs of pipes and aqueducts and expense of distribution.

Said water right is to be exchanged by the purchaser for water stock of a corresponding value in a water company to be organized and its stock to be issued on or before —.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the part- of the second part do covenant and agree to pay to the party of the first part, its successors or assigns, the sum of — dollars, U. —. gold coin, to be paid in the following manner: and interest upon said respective sums from — until paid, at the rate of eight per cent. per annum, payable annually and if not so paid at option of said company to be added to principal and bear like interest.

And the part- of the second — in consideration that the party of the first part does hereby agree that the part- of the second part may at once enter upon, occupy and enjoy the above-described premises, do further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the part- of the second part doing so, the party of the first part may pay the same, and before the final
411 payment of purchase-money, the part- of the second part hereby expressly agrees to refund all amounts so paid with interest from date of such payment at the rate of one per cent. per month.

And the part- of the second part further agree that during the pendency of this agreement — will not commit or suffer any s-rip or waste of said premises or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the part- of the second part and all claiming under — therefo*r*m, and it is agreed that in such case *that* all payments theretofore shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the part- of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the part- of the second part, — heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is hereby expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the part- of

412 the second part ha- hereunto set — hand -and seal this — day of ——, 188–.

Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By —— ——, *President*,
By —— ——, *Secretary*.

Sealed and delivered in the presence of—
—— ——. [SEAL.]
—— ——. [SEAL.]

STATE OF CALIFORNIA, } *ss*:
County of ——, }

On this — day of ——, A. D. 188–, before me, —— ——, a notary public in and for — —— of ——, personally appeared —— ——, known to me to be the president, and —— ——, known to me to be the secretary of the Pomona Land and Water Company, the corporation that executed the within instrument, and they severally acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

—— ——,
Notary Public.

Endorsed on back : Contract. Pomona Land and Water Company to —— ——. Dated —— —, 188–.

413 *2nd Contract.*

EXHIBIT D (PART OF EXHIBIT 23).

Office of the Pomona Land and Water Company.

This agreement made the — day of ——, 188–, — the Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the city and county of San Francisco, California, party of the first part, —— ——, part- of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted —— —, A. D. 188–, and in consideration of — dollars, paid by the part- of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereafter expressed to be made and performed by the part- of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale, to the part- of the second part, h- heirs or assigns, the following-described real property, situated in the county of ——, State of California, to wit: —— together with — shares of stock of the Irrigation Company of Pomona representing — inch- of water under four-inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said part- of second part,

subject to the by-laws of the said Irrigation Company of
414 Pomona, when payment in full is made for the above-described land.

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the part- of the second part do covenant and agree to pay to the party of the first part, its successors or assigns, the sum of —— dollars, U. S. gold coin, to be paid in the following manner: —— and interest upon said respective sums from —— until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the part- of the second part in consideration that the party of the first part does hereby agree that the part- of the second part may at once enter upon, occupy and enjoy the above-described premises, do further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the part- of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money, the part- of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the part- of the second part further agree that during the pendency of this agreement — will not commit or suffer any
415 strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter upon and to repossess said premises and all improvements then existing thereon; removing the part- of the second part and all claiming under — therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the part- of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance, or tender of all payments precedent thereto, the part- of the second part, — heirs or assigns, shall have no title, equitable or otherwise, to said premises.

It is further expressly agreed that time is of the essence of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president

and secretary thereunto duly authorized; and the part- of the second part has hereunto set — hand and seal this — day of —— 188 . Executed in duplicate.

POMONA LAND AND WATER COMPANY,
By —— ——, *President*,
By —— ——, *Secretary*.

Sealed and delivered in the presence of—
—— ——. [SEAL.]
—— ——. [SEAL.]

416 STATE OF CALIFORNIA, *County of* ——, } *ss*:

On this — day of ——, A. D. 188–, before me, —— ——, a notary public in and for —— of ——, personally appeared —— ——, known to me to be the president, and —— ——, known to me to be the secretary, of the Pomona Land and Water Company, the corporation that executed the within instrument, and they severally acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

—— ——,
Notary Public.

On back of contract: Contract. Pomona Land and Water Company to —— ——. Dated —— —, 188–.

417 PART OF EXHIBIT 23.

The contract dated November 16th, 1886 (executed November 23rd, 1886), between the Pomona Land and Water Company, party of the first part, and William Thomas and Wendell Easton, the parties of the second part, is hereby amended and supplemented as follows:

The said parties of the second part agree to appoint as their agent, to take charge of said contract and carry out their covenants contained therein, a competent person satisfactory to said party of the first part.

Schedule B is hereby amended so as to read:

"All of the property of said party of the first part in Los Angeles and San Bernardino counties (specifically described in Schedule A), except tracts as said party of the first part may desire to retain for its private use or for water development, construction, or distribution, and such as may be conveyed to water or irrigation companies."

If during the term of this agreement the said party of the first part should be desirous of selling any of the lands described in said *ma*ended Schedule B, as dry lands without the development of any water thereon, the same shall be scheduled as in said contract provided and fall within the provisions thereof.

And whereas a controversy has arisen as to the right of said parties of the second part to compensation in sales made by said party

of the first part between November 23rd and December 12th, 1886, said controversy — as follows, to wit:

Said parties of the second part shall receive a commission of $1,800.00 cash in full settlement of all claims for compensation for sales made during said period.

In witness whereof the said parties have set their hands
418 and seals, in duplicate, this fourth day of February, 1887.

POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President*,
By CHAS. K. CLARK, *Secretary*.
WENDELL EASTON.
WILLIAM THOMAS.

PART OF EXHIBIT 23.

Office of the Pomona Land and Water Company.

B. S. Nichols, manager. F. L. Palmer, treasurer.

POMONA, CAL., *March 16th*, 1887.

The following prices are hereby agreed upon this day as the minimum rates for the following-described property under the contract of the Pomona Land and Water Company with Thomas & Easton, November 16th, 1886:

Lot 11	of	N. E. Pomona	tract,	$250 per acre.
" 17	"	"	$250	"
" 16	"	"	$250	"
" 20	"	"	$225	"
" 19	"	"	$225	"
" 24	"	"	$225	"
" 23	"	"	$225	"

or, if sold in subdivision, $50 per acre in each lot.

POMONA LAND AND WATER COMPANY.
F. L. PALMER, *Treas.*
THOMAS & EASTON.
O. F. GRIFFIN, *Agent.*

419 PART OF EXHIBIT 23.

Office of the Pomona Land and Water Company.

B. S. Nichols, manager. F. L. Palmer, treasurer.

POMONA, CAL., *Apr. 12th*, 1887.

The following prices are hereby agreed upon this day as the minimum rates for the following-described property under the contract of the Pomona Land and Water Company with Thomas & Easton, dated November 16th, 1886:

In the San Antonio tract.

Lots 22, 21, 20, 19, 33, 34, 35, each at $150 per acre.
" 30, 38, 37, 36, " $135 "
" 40, 41, 42, 43, " $125 "

To be sold with the provision that water for irrigation is to be delivered within one-fourth of a mile of each 40-acres subdivision of said San Antonio tract.

POMONA LAND AND WATER COMPANY.
F. L. PALMER, *Treas.*
THOMAS & EASTON.
F. MACPHERSON, *Agent.*

EXHIBIT 24.

126 shares. Incorporated February 21st, 1887. No. 60.

Del Monte Irrigation Company.

Capital stock, $400,000; 40,000 shares, $10 each.

POMONA CAL., *July 24th*, 1889.

This certifies that H. M. Loud is the holder of one hundred and twenty-six shares of the capital stock of the Del Monte Irrigation Company. This certificate and interest in the capital stock represented thereby is transferable upon the books of the corporation under the following conditions only:

First. Endorsement on back of this certificate and its surrender to the corporation. Second. In accordance with the conditions and limitations of article IX of its by-laws, providing for the cotemporaneous transfer by the holder of this stock of the land upon which the water represented by this certificate of stock is used. See copy from the by-laws upon the back of this certificate.

B. S. NICHOLS, *President.*

F. L. PALMER, *Secretary.*

On back of certificate:

Extract from the By-laws of the Del Monte Irrigation Company.

Article IX.

The stock of this company cannot be transferred except on the transfer of the land on which the water represented by the stock is used or of a portion of the land, in which latter case so much of the stock as corresponds to the amount of land sold may be transferred.

Having sold and transferred to —— —— — acres of the land upon which the water represented by this certificate of stock is used, for value received I hereby sell, assign, and transfer — shares of the capital stock represented by the within certificate.

—— ——.

EXHIBIT 25.

200 shares. Incorporated February 23rd, 1887. No. 78.

Palomares Irrigation Company.

Capital stock, $200,000; 20,000 shares, $10 each.

POMONA, CAL., *July 24th*, 1889.

This certifies that H. M. Loud is the holder of two hundred shares of the capital stock of the Palomares Irrigation Company. This certificate and *and* interest in the capital stock represented
421 thereby is transferable upon the books of the corporation under the following conditions only:

First. Endorsement upon the back of this certificate and its surrender to the corporation. Second. In accordance with the conditions and limitations of article IX of its by-laws, providing for the cotemporaneous transfer by the holder of this stock of the land upon which the water represented by this certificate of stock is used. See copy from the by-laws upon the back of this certificate.

H. A. PALMER, *President.*

F. L. PALMER, *Secretary.*

On back of certificate:

Extract from the By-laws of the Palomares Irrigation Company.

Article IX.

The stock of this company cannot be transferred except on the transfer of the land on which the water represented by the stock is used or of a portion of the land, in which latter case so much of the stock as corresponds to the amount of land sold may be transferred.

Having sold and transferred to —— —— — acres of the land upon which the water represented by this certificate of stock is used, for value received I hereby sell, assign, and transfer to —— —— — shares of the capital stock represented by the within certificate.

—— ——.

EXHIBIT 26.

STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

I hereby certify the foregoing to be a full, true, and correct
422 copy of the instrument appearing recorded in Book No. 2 of Patents, page 268, records of Los Angeles county, and that I have carefully compared the same with the original record.

[SEAL.] In witness whereof I have hereunto set my hand and affixed my official seal this 11th day of April, 1890.

JOHN W. FRANCIS,
County Recorder.

The only seal affixed was a wafer stuck on without any impression thereon or therein.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

I, J. W. McKinley, do hereby certify that I am presiding judge of department 6 of the superior court of Los Angeles county, California, and do further certify that the attestation to each of the copies of instruments hereto annexed, the same being copies of deeds appearing upon the records of deeds of said county, in Book 6, at page 434; in Book 7, at page 619; in Book 35, at page 635; in Book 125, at page 21; in Book 126, at page 82, respectively, and copy of patent appearing upon the records of patents of said county, in Book 2, at page 268, is in due form and made by the proper officer, and that each of the instruments of which the annexed purport to be copies conforms to the laws of the State of California and is entitled by such laws to record in said office.

J. W. McKINLEY.

423 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

I, C. H. Dunsmoor, do hereby certify that J. W. McKinley, whose name is signed to the annexed certificate, was at the time of signing the same duly commissioned, qualified, and acting as presiding judge of department number six (6) of the superior court of the county of Los Angeles, State of California, and I further certify that his signature thereto is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of said superior court this 14th day of April, A. D. 1890.

[Seal of the Superior Court Los Angeles Co., Cal.]

C. H. DUNSMOOR,
County Clerk and ex Officio Clerk of the Superior Court of Los Angeles County, California.

Bill of exceptions filed Aug. 25, 1890.

WALTER S. HARSHA, *Clerk.*

424 Supreme Court of the United States.

HENRY M. LOUD, Plaintiff in Error,
vs.
POMONA LAND AND WATER COMPANY, Defendant in Error. }

Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the year of our Lord eighteen hundred and ninety, at the October term of said court, comes the said Henry M. Loud, by Benton Hanchett, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First. That the court erred in admitting in evidence the contracts and applications sued upon.

Second. That the court erred in admitting in evidence the contract described in the forty-ninth count of the declaration.

Third. That the court erred in overruling the motion of defendant below, made at the close of plaintiff's case, that a nonsuit be entered against the plaintiff.

425 Fourth. That the court erred in refusing to admit in evidence the several certified copies of deeds executed by the Pomona Land and Water Company to different parties conveying water rights in the Del Monte Irrigation Company, the Palomares Irrigation Company, and the Irrigation Company of Pomona, offered by the defendant below, to show conveyances by the Pomona Land and Water Company of water rights in said irrigation companies.

Fifth. That the court erred in refusing to admit in evidence the deed made by the Pomona Land and Water Company to Charles W. Brown, offered for the same purpose as said certified copies.

Sixth. That the court erred in admitting in evidence the contract between the Pomona Land and Water Company and the Irrigation Company of Pomona.

Seventh. That the court erred in permitting witness Palmer to answer the question "How much water does a share of stock represent?"

Eighth. That the court erred in admitting in evidence the shares of stock issued to defendant, Henry M. Loud, in the Irrigation Company of Pomona, the Palomares Irrigation Company, and the Del Monte Irrigation Company.

Ninth. That the court erred in refusing to admit in evidence the Charles W. Brown deed and the several certified copies of

426 deeds executed by the Pomona Land and Water Company to different parties reoffered by defendant to show the water rights which were conveyed by the Pomona Land and Water Company, and to supply which irrigation companies were formed.

Tenth. That the court erred in not admitting in evidence the certified copy of the patent from the United States to Henry Dalton, Ignatio Palomares, and Ricardo Vejar, and in ruling the same out of the case as evidence.

Eleventh. That the court erred in refusing to permit the defendant, Henry M. Loud, to testify to the representations made to him by O. F. Giffin to induce the defendant to make the purchases and accept the contracts sued upon.

Twelfth. That the court erred in striking out the testimony of defendant, Henry M. Loud, that he had no knowledge of his own of the articles of association and by-laws of the Del Monte Irrigation Company, the Palomares Irrigation Company, and the Irrigation Company of Pomona.

Thirteenth. That the court erred in striking out the testimony of the defendant, Henry M. Loud, tending to show that he did no acts on lot eleven in the northeast Pomona tract since the fall of 1888, and that said lot had remained vacant and not in his possession since the fall of 1888.

427 Fourteenth. That the court erred in refusing to charge the jury as requested in the first written request of defendant, Henry M. Loud.

Fifteenth. That the court erred in refusing to charge the jury as

requested in the second written request of defendant, Henry M. Loud.

Sixteenth. That the court erred in refusing to charge the jury as requested in the third written request of defendant, Henry M. Loud.

Seventeenth. That the court erred in refusing to charge the jury as requested in the fourth written request of defendant, Henry M. Loud.

Eighteenth. That the court erred in refusing to charge the jury as requested in the fifth written request of defendant, Henry M. Loud.

Nineteenth. That the court erred in refusing to charge the jury as requested in the sixth written request of defendant, Henry M. Loud.

Twentieth. That the court erred in refusing to charge the jury as requested in the seventh written request of defendant, Henry M. Loud.

Twenty-first. That the court erred in refusing to charge
428 the jury as requested in the eighth written request of defendant, Henry M. Loud.

Twnety-second. That the court erred in refusing to charge the jury as requested in the ninth written request of defendant, Henry M. Loud.

Twenty-third. That the court erred in refusing to charge the jury as requested in the tenth written request of defendant, Henry M. Loud.

Twenty-fourth. That the court erred in refusing to charge the jury as requested in the eleventh written request of defendant, Henry M. Loud.

Twenty-fifth. That the court erred in refusing to charge the jury as requested in the twelfth written request of defendant, Henry M. Loud.

Twenty-sixth. That the court erred in refusing to charge the jury as requested in the thirteenth written request of defendant, Henry M. Loud.

Twenty-seventh. That the court erred in refusing to charge the jury as requested in the fourteenth written request of defendant, Henry M. Loud.

Twenty-eighth. That the court erred in refusing to charge the jury as requested in the fifteenth written request of defendant, Henry M. Loud.

429 Twenty-ninth. That the court erred in refusing to charge the jury as requested in the sixteenth written request of defendant, Henry M. Loud.

Thirtieth. That the court erred in refusing to charge the jury as requested in the seventeenth written request of defendant, Henry M. Loud.

Thirty-first. That the court erred in refusing to charge the jury as requested in the eighteenth written request of defendant, Henry M. Loud.

Thirty-second. That the court erred in refusing to charge the

jury as requested in the nineteenth written request of defendant, Henry M. Loud.

Thirty-third. That the court erred in refusing to charge the jury as requested in the twentieth written request of defendant, Henry M. Loud.

Thirty-fourth. That the court erred in refusing to charge the jury as requested in the twenty-first written request of defendant, Henry M. Loud.

Thirty-fifth. That the court erred in refusing to charge the jury as requested in the twenty-second written request of defendant, Henry M. Loud.

430 Thirty-sixth. That the court erred in refusing to charge the jury as requested in the twenty-third written request of defendant, Henry M. Loud.

Thirty-seventh. That the court erred in refusing to charge the jury as requested in the twenty-fourth written request of defendant, Henry M. Loud.

Thirty-eighth. That the court erred in refusing to charge the jury as requested in the twenty-fifth written request of defendant, Henry M. Loud.

Thirty-ninth. That the court erred in refusing to charge the jury as requested in the twenty-sixth written request of defendant, Henry M. Loud.

Fortieth. That the court erred in refusing to charge the jury as requested in the twenty-seventh written request of defendant, Henry M. Loud.

Forty-first. That the court erred in directing the jury to render a verdict for plaintiff, The Pomona Land and Water Company.

Wherefore the said Henry M. Loud prays that the judgment of the circuit court of the United States for the eastern district of Michigan be reversed.

BENTON HANCHETT,
Attorney for Plaintiff in Error, Saginaw, Michigan.

Filed Sept. 17, 1890.

WALTER S. HARSHA, *Clerk.*

431 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

THE POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writ of error sued out by the defendant, Henry M. Loud, in the above-entitled cause to the Supreme Court of the United States from the judgment of this court in said cause that the above and foregoing is a true copy of the record and proceedings of this court

therein and of said defendant's writ and assignments of error as the same appear on file and of record in my office; that I have compared the same with the original, and they are true and correct transcripts therefrom and of the whole thereof. The original writ of error and citation, with proof of service, is hereto attached.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this seventeenth day of September, in the year one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fifteenth.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: Case No. 14,170. E. Michigan C. C. U. S. No. 194. Henry M. Loud, plaintiff in error, *vs.* The Pomona Land & Water Company. Filed September 25, 1890.

Office Supreme Court U. S.
FILED.
JAN 5 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 194.

HENRY M. LOUD, PLAINTIFF IN ERROR,

vs.

THE POMONA LAND AND WATER COMPANY.

The following opinion of Mr. Justice Brewer denying the motion for a new trial was delivered orally and is printed from the stenographic notes of the Court reporter as an appendix to the brief for defendant in error.

We understand the reporter's notes were not revised by the Justice.

THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

THE POMONA LAND AND WATER COMPANY
vs.
HENRY M. LOUD.

Oral Opinion.

BREWER, *J.*:

The case of The Pomona Land and Water Company *vs.* Henry M. Loud. On motion for a new trial. Reversing the order in which the questions were presented, I notice first the claim of error in the refusing to admit a deed under

the certificate made by the recorder in California. The refusal was because the certificate of the recorder was not attested by his official seal. There was a wafer attached, but no impress. That certificate of the recorder was certified to by the presiding judge of one of the departments of the superior court of Los Angeles county and his signature also attested by the court, but the defect was that there was no seal attached; nothing but a wafer, without any impress. The law of California in respect to official seals provides for an impression, either upon the paper or the wafer attached. In some form or shape there must be an impression and not the mere attaching of the wafer, and, that being the law of California, the very language of the certificate shows that a seal was contemplated, because the recorder certifies that he has attested it with the seal of his office, and there is the wafer without the impression. Not only that, but in the same bundle of papers there is a seal from the same officer with the impression on the wafer, which makes it perfectly clear that he did have a seal; that he did attach it in the one case; that he failed to attach it in the other and simply put a wafer upon the paper.

Then the law of California, which was presented to us after the argument, shows that the recorder is required by statute to have a seal. So there can be no question but that the patent was properly rejected, and that there was no substantial injury therefrom is made clear upon the fact that the trial judge said to the party at the time that if he could show at the time that the vendor had no title that the verdict would be set aside. To that question the party did not seem to put an inquiry, resting it simply upon the technical question as to the form of admission of the certificate. That question did not trouble me very much. The other questions are the difficult ones. One is as to the meaning of this provision of the land contract. It was a contract for the sale of a certain tract of land, together with two hundred shares of stock of the Palmonares Irrigation

Company, representing two inches of water under four-inch pressure, measured from center of aperture. Now, what is the scope and effect of that stipulation. Is it in any way a guarantee that a certain amount of water passes with the deed or is it simply a contract to transfer two hundred shares of stock in that existing company? I think the latter. It is two hundred shares of stock, and without other words that must, in all corporate matters, mean shares of capital stock of a living and existing company. It is as definite and fixed as a contract to convey two shares of stock in the Michigan Central Railroad Company. It means that the property which is covered by such a certificate of two shares of stock. Not only that; it is expressly stated that this stock is subject to the by-laws of the Palmonares Irrigation Company, so that whatever water rights that stock would convey were prescribed by the constitution and by-laws of the company, and the party in this contract was notified where to look for the water rights which that stock would transfer to him. So far as that expression, "representing two inches of water under four-inch pressure," is concerned, that means not a guarantee of such an amount of water; and, indeed, in those countries where they depend upon irrigation a guarantee of that would very seldom be found, because it is familiar that in some seasons there is a scarcity of water, and all who take from the ditches have to divide the amount of water, submit to the *pro rata* reduction; and it would be very strange if a party making a land contract like that would put into it as part and parcel of his contract of sale a guarantee, absolute, permanent, and fixed, of such a water supply, but it means that this stock—two hundred shares of stock—in this company, according to its charter and with the water rights it has, represents such a supply of water, two inches of water under four-inch pressure. That is all it means, and in order to notify the contract purchaser exactly what he would take from those shares of stock the irrigation com-

pany is named, and it is stated that he takes subject to the by-laws of that company, so it can be construed only as a contract that with the deed of this land shall be transferred two hundred shares of stock in that company, with all the rights, present and prospective, these shares of stock in that company would give. That I think is quite clear.

Now, the remaining and most difficult question, to my mind at least, and the only one which I hesitated about is this: The contract provides that in consideration of $550 paid by the party of the second part the party of the first part does covenant and agree that after the making of the payments and the full performance of the covenants hereinafter expressed to be made by the party of the second part the party of the first part will, in consideration therefor, convey their deed of grant, bargain, and sale. The question is whether payment and conveyance are concurrent and dependent or independent stipulations. The language is that after the making of the payments the vendor will convey. A first glance at that language would seem to suggest that the money was to be paid first, and that there was no right to demand the deed until after the money was paid, and that therefore it was that an action could not be brought for the money before tender of the deed; but I think that the general tendency of the later decisions is that when the transaction of payment and conveyance are not separated by specific amounts of time that they are ordinarily to be construed as dependent. That seems to be the opinion of the Supreme Court in the case of The Bank of Columbia *vs.* Hagner, where the "undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears." So the term *after*; the meaning of it is satisfactory if we take it as expressing what of course would be the right meaning, that the party must pay before he is entitled to the deed, but that the two acts are, to a certain extent, cotemporaneous; that immediately upon the payment he is entitled to the conveyance; and

yet there is a force in the word "after" which is different from "upon" payment or "as soon as" payment. There the construction is uniform that they are dependent. But where there are dependent covenants it is the general rule that a party must allege a tender on his part before seeking to enforce performance on the other part. And why is that? Take a case like this. The law does not mean that there should be two suits. It does not mean that the vendor shall sue to recover the purchase-money and then, the vendor having paid the purchase-money, shall be put to a separate and independent action to compel the execution of the deed. Where the promise to pay is definite and absolute, standing by itself, the party has a right to say pay me my money and to insist upon that, and it is simply to guard against the necessity of his being compelled to come into court and himself maintain a suit for a deed to perfect his title. The court in this Bank of Columbia case say: "Although many nice distinctions are to be found in the books as to the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent, yet it is evident that the inclination of courts has strongly favored the latter construction as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence in such cases if either a vendor or a vendee wish to compel the other to fulfill his contract he must make his part of the agreement precedent and cannot proceed against the other without an actual performance of the agreement on his part or a tender and refusal, and an averment to that effect is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof;" but, as I have said, there is a principle underlying that which I have endeavored to lay down, and that is the allegation of readiness to convey. It appears that the de-

fendant was called upon for the payment of the money after the money became due. Now, it seems to me that it would be resting upon the letter too much and ignoring the spirit of the contract as thus far carried on in this litigation to set aside this verdict and compel the plaintiff to dismiss his suit and go through the form of making tender before he could maintain this action, especially when the language of the deed is open to that construction—that the payment is to be first. It is after payment that a deed is to be made, and I think the rights of the vendee can be protected fully under the pleadings and the litigation as it now stands without all this trouble of a new trial and by this simple provision: Inserting in the judgment an order that no execution can issue until the plaintiff has deposited with the clerk of the court for the benefit of the vendee all deeds to the land and certificate of stock, and, in order that he may not be prejudiced by having deeds and shares of stock placed in the clerk's hands and execution issued immediately without an opportunity to examine to see if there are any incumbrances on the title or intermediate transfers, that no execution shall issue until thirty days after the deposit with the clerk for the benefit of the vendee of those deeds and that stock, that he may have ample time if he desires to examine the record to see the title is perfect and to see the transfer of stock is in accordance with the laws of California. On the other hand, the vendor will not be put to the necessity of dismissing this suit in making a form of tender and commencing anew. That, it seems to me, is substantial justice, and that is the end and aim of the law.

DEC 29 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

HENRY M. LOUD,
Plaintiff in Error,

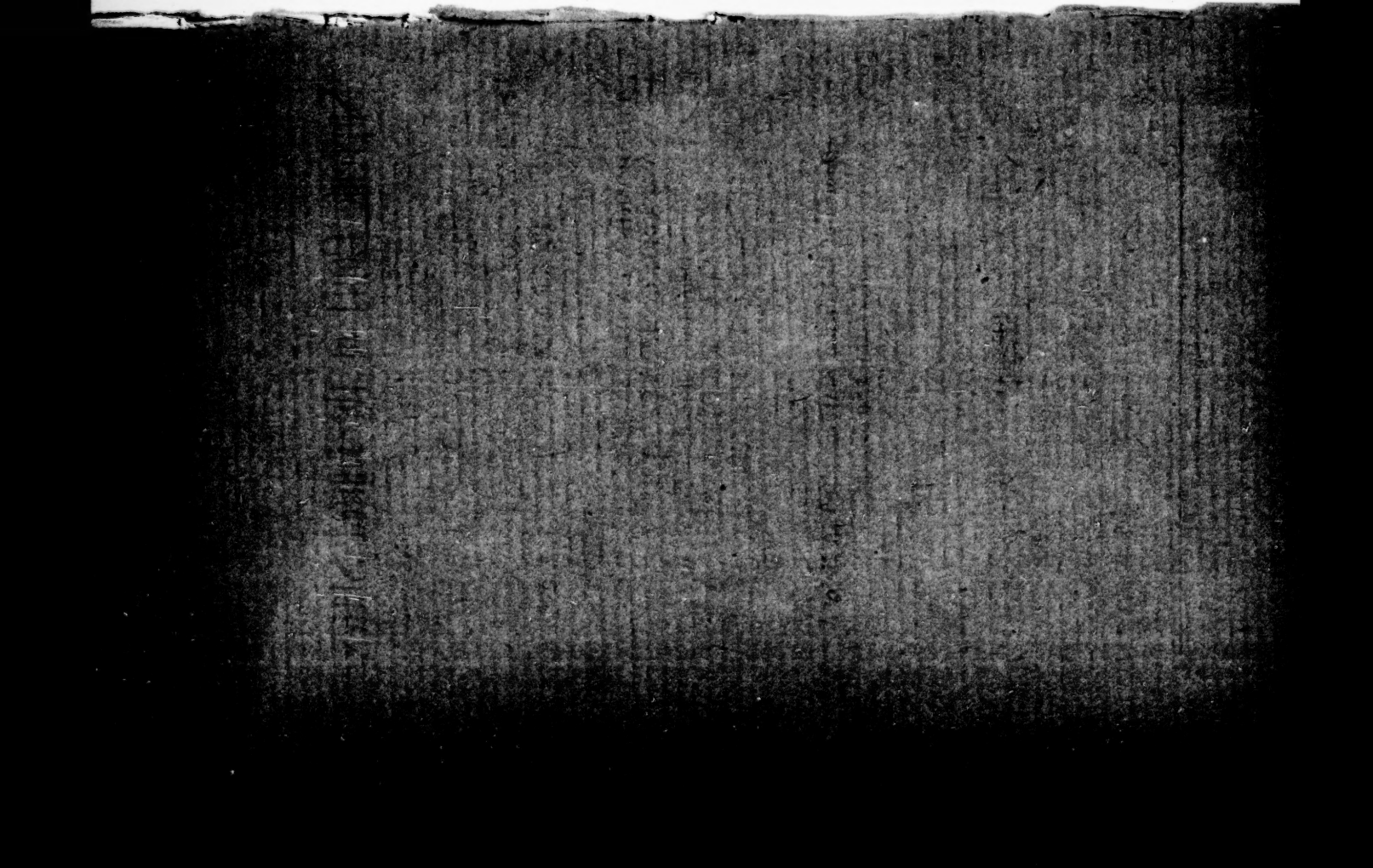
vs.

THE POMONA LAND
AND WATER COMPANY,
Defendant in Error.

Copies of California Statutes cited in Brief of Plaintiff in Error.

BENTON HANCHETT,
Plaintiff's Attorney.

SEEMANN & PETERS, PRINTERS, SAGINAW, MICH.



SUPREME COURT

OF THE UNITED STATES.

HENRY M. LOUD,
Plaintiff in Error,

vs.

THE POMONA LAND
AND WATER COMPANY,
Defendant in Error.

Copies of the Statutes of California cited in the Brief of Plaintiff in Error.

On page 33 of the Brief of plaintiff in error, the following citations of the Statutes of California are made, viz :

"*First.* The Statute forbids the capital stock of any corporation to be issued, except for money paid, labor performed, or property received.

2 Deering Stat. of Cal., Sec. 359,
Constitution of Cal., Art. 12, Sec. 1."

2 Deering's Statutes of California, Sec. 359, is as follows :
"Sec. 359. No corporation shall issue stock or bonds ex-

cept for money paid, labor done, or property actually received, and all fictitious increase of stock, or indebtedness shall be void."

The constitution of California, Art. 12, Sec. 1, is as follows:

"Sec. 1. Corporations may be formed under general laws, but shall not be created by special act. The laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time, or repealed."

The Brief, page 33, states :

"*Second.* The stock can be issued only when full paid, or when the by-laws provide for issuing certificates prior to the full payment under such restrictions and for such purposes as the by-laws may provide.

2 Deering's Stat. of Cal., Sec. 323."

2 Deering's Statutes of California, Sec. 323, is as follows :

"Sec. 323. All corporations for profit must issue certificates for stock when fully paid up, signed by the president and secretary, and may provide in their by-laws, for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide."

On page 34 of said Brief the citations of said statutes are as follows :

"*Third.* The stock is made by the statute assessable for its full amount for expenses, for conducting the business, and for paying the debts of the corporation. It is not intended that this can be evaded or avoided.

Sec. 331."

2 Deering's Statutes of California, Sec. 331, is as follows :

"Sec. 331. The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form and to the extent, provided herein."

"Sec. 332. No one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows :

1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock ; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount."

"*Fifth.* The statute expressly forbids the dividing, withdrawing, or paying to stockholders any part of the capital stock, except on dissolution of the corporation.

Sec. 309."

2 Deering's Statutes of California, Sec. 309, is as follows :

"Sec. 309. The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock, except as hereinafter specially provided. For a violation of the pro-

visions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen) are in their individual and private capacity jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence."

On page 35 of said Brief, the statute is cited as follows:

"*Sixth.* The stock is made expressly personal property and transferable as personal property, as above pointed out. Sec. 324."

2 Deering's Statutes of California, Sec. 324, is as follows:

"Sec. 324. Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney, or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer."

"*Seventh.* The companies are formed under the general statute.

Secs. 285, 286, 289, 290."

2 Deering's Statutes of California, Sec. 285, is as follows:

"Sec. 285. Private corporations may be formed by the voluntary association of any five or more persons, in the manner prescribed in this article. A majority of such persons must be residents of this state."

2 Deering's Statutes of California, Sec. 286, is as follows:

"Sec. 286. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves."

2 Deering's Statutes of California, Sec. 289, is as follows:

"Sec. 289. The instrument by which a private corporation is formed is called "articles of incorporation."

2 Deering's Statutes of California, Sec. 290, is as follows:

"Sec. 290. Articles of incorporation must be prepared, setting forth:

1. The name of the incorporation;

2. The purpose for which it is framed;

3. The place where its principal business is to be transacted;

4. The term for which it is to exist, not exceeding fifty years;

5. The number of its directors or trustees, which shall not be less than five nor more than eleven, and the names and residence of those who are appointed for the first year, provided that the corporate powers, business and property of corporations formed or to be formed for the purpose of erecting and managing halls and buildings for the meetings and accommodation of several lodges or societies of any

benevolent or charitable order or organization, and in connection therewith the leasing of stores and offices in such building or buildings for other purposes, may be conducted, exercised and controlled by a board of not less than five nor more than fifty directors, to be chosen from among the stockholders of such corporation, or from among the members of such order or organization; and provided also, that at any time during the existence of corporations for profit, other than those of the character last hereinabove provided for, the number of the directors may be increased or diminished by a majority of the stockholders of the corporation to any number not exceeding eleven nor less than five, who must be members of the corporation, whereupon a certificate, stating the number of directors, must be filed, as provided for in section two hundred and ninety-six for the filing of the original articles of incorporation;

6. The amount of its capital stock, and the number of shares into which it is divided;

7. If there is a capital stock, the amount actually subscribed, and by whom."

On page 39 of said brief, the statute is cited that, "under the statute of California, the owner of capital stock is expressly made liable personally for all debts of the company contracted while he was a stockholder.

2 Deering's Stat., Sec. 322."

2 Deering's Statutes of California, Sec. 322, is as follows:

"Sec. 322. Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt

or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim, payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith. If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt; and if an action has been brought against him upon such debt, it shall be dismissed as to him, upon his paying the costs, or such proportion thereof as may be properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred; and such liability is not released by any subsequent transfer of stock. The term "stockholder," as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another, and also to every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian or other trustee who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian or trustee shall not be liable under the provisions of this section by reason of any such investment, nor shall the person for whose benefit the investment is made be responsible in respect to the stock, until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment shall continue until that period. Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any propor-

tion of the debts or liabilities of the corporation; but the pledgor or person or estate represented, is to be deemed the stockholder as respects such liability. In corporations having no capital stock, each member is individually and personally liable for his proportion of its debts and liabilities, and similar actions may be brought against him, either alone or jointly with other members, to enforce such liability as by this section may be brought against one or more stockholders, and similar judgments may be rendered. The liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this state."

BENTON HANCHETT,
Att'y for Plaintiff in Error.

FILED.
DEC 15 1893
JAMES H. McKENNEY,
CLERK

94

Supreme Court of the United States.

HENRY M. LOUD,
Plaintiff in Error,

vs.

THE POMONA LAND
AND WATER COMPANY,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

BENTON HANCHETT,
Plaintiff's Attorney.

SEEMANN & PETERS, PRINTERS, SAGINAW, MICH.

SUPREME COURT.

HENRY M. LOUD,
Plaintiff in Error.
vs.
THE POMONA LAND
AND WATER COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This suit is upon twenty contracts, substantially the same in form, which are set out in the first twenty counts of the declaration, and which are covered by the first forty counts of the declaration (Record, pp. 7 to 118 inclusive), also upon nine applications for the purchase of lands which are substantially the same in form, and are covered by counts forty-one to forty-nine inclusive (Record, pp. 119 to 134). The counts from fifty to sixty-three inclusive (Record, pp. 134 to 149) were demurred to by defendant and the demurrer sustained. (Record, pp. 153, 154 and 155.)

The contracts are between the defendant as first party thereto and plaintiff as second party thereto, whereby defendant agreed that after the making of the payments therein pro-

vided to be made by plaintiff, it would convey to plaintiff certain property in Los Angeles county, California, together with certain shares of stock in an irrigation company named, representing a certain number of inches of water under four-inch pressure, measured from center of aperture. In consideration thereof plaintiff agreed to make certain payments. In case of default, defendant had the right to rescind the contract and retain all payments made, as stipulated damages. Time, it was expressly agreed, is of the essence of the contract.

Suit was brought to recover the amounts claimed to be owing on these contracts by plaintiff in error, and was brought some considerable time after the last payments fell due, there is no averment or proof of any tender of conveyance of land, or stock, or water rights at the time the last payment fell due or prior to bringing suit, or any proof of ability to perform its contract on part of defendant in error.

The applications are substantially alike, and one is set forth in full, under the sixth head of this brief, and are in the nature of options; no averment or proof of the execution or tender of a contract by defendant in error was made. One application, that set up in the forty-ninth count, was for the purchase of a certain lot 11, and the declaration shows that even the payment to have been made in sixty days was not made, but it relies upon plaintiff's having taken possession of the land just after the application was made. When defendant in error offered the contracts in evidence they were objected to, and when it rested its case plaintiff moved a non-suit because defendant in error had not shown any tender of performance upon its part, or ability to perform upon its part, the contracts sued upon, which motion was overruled and exception was duly taken.

Plaintiff in error then showed that he entered into the contracts with defendant in error through O. F. Griffin, and offered to show that it was represented to him by Griffin at

the time of his purchase that he would get a good title to the water as well as the land, and that plaintiff took the contracts, relying on the fact that he had got such title as was represented to him he would get, that it was represented to him that there would be no liability on the contract other than forfeiture of the amount paid, and further offered to show that he had no knowledge relating to the articles of incorporation of any of the irrigating companies, or by-laws, and as to said lot 11 had done nothing upon it since 1888, all of which was rejected by the Court, and duly excepted to.

Plaintiff also offered certain deeds before that given by defendant, with definite and fixed water rights, for the purpose of showing what was understood to be water rights and water stock, and showing water rights already conveyed by defendant, which deeds were excluded and exception duly taken.

Plaintiff also offered a certified copy of a patent in evidence, for the purpose of showing that defendant had no title to the lands, which copy was objected to because of the lack of a seal in the certificate, and was ruled out, to which an exception was duly taken.

The errors assigned by plaintiff are as follows, and are all relied upon, viz:

First. That the Court erred in admitting in evidence the contracts and applications sued upon.

Second. That the Court erred in admitting in evidence the contract described in the forty-ninth count of the declaration.

Third. That the Court erred in overruling the motion of defendant below, made at the close of the plaintiff's case, that a non-suit be entered against the plaintiff.

Fourth. That the Court erred in refusing to admit in evidence the several certified copies of deeds executed by the Pomona Land and Water Company to different parties con-

veying water rights in the Del Monte Irrigation Company, the Palomares Irrigation Company, and the Irrigation Company of Pomona, offered by the defendant below, to show conveyances by the Pomona Land and Water Company of water rights in said irrigation companies.

Fifth. That the Court erred in refusing to admit in evidence the deed made by the Pomona Land and Water Company to Charles W. Brown, offered for the same purpose as said certified copies.

Sixth. That the Court erred in admitting in evidence the contract between the Pomona Land and Water Company and the Irrigation Company of Pomona.

Seventh. That the Court erred in permitting witness Palmer to answer the question, "How much water does a share of stock represent?"

Eighth. That the Court erred in admitting in evidence the shares of stock issued to defendant Henry M. Loud, in the Irrigation Company of Pomona, the Palomares Irrigation Company, and the Del Monte Irrigation Company.

Ninth. That the Court erred in refusing to admit in evidence the deeds executed by the Pomona Land and Water Company to different parties re-offered by defendant to show the water rights which were conveyed by the Pomona Land and Water Company, and to supply which irrigation companies were formed.

Tenth. That the Court erred in not admitting in evidence the certified copy of the patent from the United States to Henry Dalton, Ignatio Palomares and Ricardo Vejar, and in ruling the same out of the case as evidence.

Eleventh. That the Court erred in refusing to permit the

defendant, Henry M. Loud, to testify to the representations made to him by O. F. Griffin, to induce the defendant to make the purchases and accept the contracts sued upon.

Twelfth. That the Court erred in striking out the testimony of defendant, Henry M. Loud, that he had no knowledge of his own of the articles of association and by-laws of the Del Monte Irrigation Company, the Palomares Irrigation Company, and the Irrigation Company of Pomona.

Thirteenth. That the Court erred in striking out the testimony of the defendant, Henry M. Loud, tending to show that he did no acts on lot eleven in the northeast Pomona tract since the fall of 1888, and that said lot had remained vacant and not in his possession since the fall of 1888.

Fourteenth. That the Court erred in refusing to charge the jury as requested in the first written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts declared upon in the 41st, 42d, 43d, 44th, 45th, 46th, 47th, 48th, and 49th counts of the declaration, for the reason that there is no averment nor proof of any delivery or tender by the plaintiff to the defendant of an executed contract for the land described in the contracts declared upon. In order to entitle the plaintiff to recover, a contract executed by the plaintiff for a sale of the land and water rights described in said counts should have been delivered or tendered to the defendant by the plaintiff upon the payment by the defendant of the first payment provided for in the contracts sued upon, and the plaintiff should have averred in his declaration and proved such delivery or tender."

Fifteenth. That the Court erred in refusing to charge the jury as requested in the second written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in said counts, for the reason that such contracts are not proved. The contracts offered in evidence by the plaintiff under these counts are different from the contracts declared upon for the reason that the contracts offered require that the plaintiff should deliver to the defendant contracts executed by the plaintiff for a sale of the land and water rights to the defendant when the defendant made the first payment provided for in the contracts, while the contracts declared upon contain no such requirements."

Sixteenth. That the Court erred in refusing to charge the jury as requested in the third written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon said counts for the reason that the declaration does not aver and the evidence does not show any tender by the plaintiff to the defendant of a deed of the land and water rights described in the contracts."

Seventeenth. That the Court erred in refusing to charge the jury as requested in the fourth written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon said counts for the reason that the declaration does not aver what are the water rights pertaining to the lands described in the contract and does not aver a tender of any contract or deed to the defendant for such water rights."

Eighteenth. That the Court erred in refusing to charge the jury as requested in the fifth written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover under said counts for the reason that the declaration does not aver that the plaintiff was the owner of the water rights described in the contracts referred to in said counts and an offer or tender to

the defendant of a conveyance of the title to such water rights."

Nineteenth. That the Court erred in refusing to charge the jury as requested in the sixth written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in the 41st, 42nd, 43rd, 44th, 45th, 46th, 47th and 48th counts of the declaration, because the declaration does not aver, and the evidence does not show that the plaintiff had a good title to the lands described in said contracts, and a tender of a conveyance of such title to the defendants at the time when the last payment upon such contracts became due by the terms of such contract, or at any subsequent time."

Twentieth. That the Court erred in refusing to charge as requested in the seventh written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in the first fourty counts of the declaration for the reason that the declaration does not aver and the evidence does not show that the plaintiff had a good title to the stock described in said contracts, and a tender of the conveyance of such title to the defendant at the time when the last payments upon such contracts became due by the terms of such contracts or at any subsequent time.

Twenty-first. That the Court erred in refusing to charge the jury as requested in the eighth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th and 31st counts of the declaration, for the reason that the declaration does not aver and the evidence does not show that the plaintiff had a good title to the lands described in said

contracts, and a tender of the conveyance of such title to the defendant at the time when the last payments upon such contracts became due by the terms of such contracts or at any subsequent time."

Twenty-second. That the Court erred in refusing to charge the jury as requested in the ninth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contract described in the 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th and 40th counts of the declaration, for the reason that the declaration does not aver and the evidence does not show that the plaintiff had a good title to the lands described in said contracts, and a tender of a conveyance of such title to the defendant at the time when the last payment upon such contracts became due by the terms of such contracts, or at any subsequent time."

Twenty-third. That the Court erred in refusing to charge the jury as requested in the tenth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts declared upon in said first forty counts, because the declaration does not aver any tender by the plaintiff to the defendant of a deed of the lands and stocks described in said contracts at the time when the last payment became due on said contracts, and does not aver any reason why such tender was not made."

Twenty-fourth. That the Court erred in refusing to charge the jury as requested in the eleventh written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contract declared upon in the said first forty counts, because the declaration does not aver any tender of a deed to the defendant by the plaintiff, of the lands and stock described in said

contracts at any time, and does not aver any reason why such tender was not made."

Twenty-fifth. That the Court erred in refusing to charge the jury as requested in the twelfth written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts declared upon in the said first forty counts. The declaration does not aver, and the evidence does not show that the plaintiff tendered or offered the defendant the stock described in said contract at any time when the last payments on said contracts became due, and the declaration does not aver any reason why such tender was not made."

Twenty-sixth. That the Court erred in refusing to charge the jury as requested in the thirteenth written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in said first forty counts, for the reason that the declaration does not aver, and the evidence does not show any tender by the plaintiff to the defendant at any time of the stock described in said contracts."

Twenty-seventh. That the Court erred in refusing to charge the jury as requested in the fourteenth written request of defendant, Henry M. Loud, viz:

"The contracts declared upon in the 1st, 3d, 4th, 5th, 6th, 21st, 23d, 24th, 25th and 26th counts require the conveyance and delivery by the plaintiff to the defendant of stock in the Del Monte Irrigation Company, which stock represents water in the amount of one inch of water, under four-inch pressure, measured from the center of aperture, for each one hundred shares of stock, and in that proportion of water for the amount of stock specified in the contracts respectively, and this means that such stock shall convey a title to the defendant of such water. In order to recover, the plaintiff is

required to aver in the declaration and prove that the stock in said contracts does represent and convey title to such amount of water, and that the plaintiff tendered such stock to the defendant. Because the plaintiff has not made such averment and proof, it is not entitled to recover upon such contracts.

Twenty-eighth. The Court erred in refusing to charge the jury as requested in the fifteenth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon said first, 2nd, 3rd, 4th, 5th, 6th, 21st, 23rd, 24th, 25th and 26th counts, because the evidence in the case fails to show that the stock described in the contracts declared upon in said counts represents the water or the title to water, as required by the contracts."

Twenty-ninth. That the Court erred in refusing to charge the jury as requested in the sixteenth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts declared upon in said 1st, 3rd, 4th, 5th, 6th, 21st, 23rd, 24th, 25th and 26th counts, because the evidence shows that the plaintiff did not have title to such stock as is described in said contracts, viz: stock which represents or constitutes a tittle to water at the rate of one inch under four-inch pressure, measured from the center of aperture, and was therefore not in a position to perform the contracts on its part."

Thirtieth. That the Court erred in refusing to charge the the jury as requested in the seventeenth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in said 1st, 3d, 4th, 5th, 6th, 21st, 23d, 24th, 25th and 26th counts because the plaintiff has not tendered to the defendant such stock as the contracts require."

Thirty-first. That the Court erred in refusing to charge the jury as requested in the eighteenth written request of defendant Henry M. Loud, viz :

"The contract declared upon in said 2nd, 7th, 8th, 9th, 10th, 11th, 22d, 27th, 28th, 29th, 30th and 31st. counts require the conveyance and delivery by the plaintiff to the defendant of stock in the Irrigation Company of Pomona, which stock represents water in the amount of one inch of water under a four inch pressure, measured from centre of aperture, for each 100 shares of stock, and in that proportion of water for the amount of stock specified in the contracts respectively, and this means that such stock shall convey a title to the defendant of such water. In order to recover, the plaintiff is required to aver in the declaration and prove that the stock specified in said contracts does represent and convey title to such amount of water, and that the plaintiff tendered such stock to the defendant. Because the plaintiff has not made such averment and proof it is not entitled to recover on said contracts.

Thirty-second. That the Court erred in refusing to charge the jury as requested in the 19th written request of defendant Henry M. Loud, viz :

"The plaintiff is not entitled to recover upon said 2nd, 7th, 8th, 9th, 10th, 11th, 22nd, 27th, 28th, 29th, 30th, and 31st counts, because the evidence in the case fails to show that the stocks described in the contracts declared upon in said counts represents water or the title to water, as required by the contracts."

Thirty-third. That the Court erred in refusing to charge the jury as requested in the twentieth written request of defendant, Henry M. Loud, viz :

"The plaintiff is not entitled to recover upon the contracts declared upon in said 2nd, 7th, 8th, 9th, 10th, 11th, 22nd,

27th, 28th, 29th, 30th and 31st counts, because the evidence shows that the plaintiff did not have title to such stock as is described in said contracts, viz: stock which represents or constitutes a title to water at the rate of one inch of water under four-inch pressure, measured from the center of aperture, and was therefore not in position to perform the contracts on its part."

Thirty-fourth. That the Court erred in refusing to charge the jury as requested in the twenty-first written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in said 2nd, 7th, 8th, 9th, 10th, 11th, 22nd, 27th, 28th, 29th, 30th and 31st counts, because the plaintiff has not tendered to the defendant such stock as the contracts require."

Thirty-fifth. That the Court erred in refusing to charge the jury requested in the twenty-second written request of defendant, Henry M. Loud, viz:

"The contracts declared upon in said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th and 40th counts require the conveyance and delivery by said plaintiff to the defendant of stock in the Palomares Irrigation Company, which stock represents water in the amount of one inch of water under four-inch pressure, measured from center of aperture for each one hundred shares of stock and in that proportion of water for the amount of stock specified in the contracts respectively, and this means that such stock shall convey a title to the defendant of such water. In order to recover, the plaintiff is required to aver in the declaration and prove that the stock specified in said contracts does represent and convey the title to such amount of water, and that the plaintiff tendered such stock to the defendant. Because the plaintiff has not made such averment and proof it is not entitled to recover upon said contracts."

Thirty-sixth. That the Court erred in refusing to charge the jury as requested in the twenty-third written request of defendant, Henry M. Loud, viz :

"The plaintiff is not entitled to recover upon said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th and 40th counts because the evidence in the case fails to show that the stock described in the contracts declared upon in said counts represents water or the title to water, as required by the contracts."

Thirty-seventh. That the Court erred in refusing to charge the jury as requested in the twenty-fourth written request of defendant, Henry M. Loud, viz :

"The plaintiff is not entitled to recover upon the contracts declared upon in said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th and 40th counts because the evidence shows that the plaintiff did not have title to such stock as described in said contracts, viz: stock which represents a title to water at the rate of one inch of water under four-inch pressure, measured from center of aperture, and was therefore not in position to perform the contracts on its part."

Thirty-eighth. That the Court erred in refusing to charge the jury as requested in the twenty-fifth written request of defendant, Henry M. Loud, viz :

"The plaintiff is not entitled to recover upon the contracts described in said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th and 40th counts because the plaintiff has not tendered to the defendant such stock as the contracts require."

Thirty-ninth. That the Court erred in refusing to charge the jury as requested in the twenty-sixth written request of defendant, Henry M. Loud, viz :

"The plaintiff is not entitled to recover upon the contracts declared upon in the 49th count for the reasons :

1st. The declaration avers that the defendant did not purchase the property and did not make the first payment, and the evidence shows that the first payment was not made, and therefore, by the terms of the contract the plaintiff has no right to recover.

2nd. Because the plaintiff does not aver and show a tender of a contract executed by the plaintiff to the defendant for the land."

Fortieth. That the Court erred in refusing to charge the jury as requested in the twenty-seventh written request of defendant, Henry M. Loud, viz :

"Upon the whole evidence, the plaintiff is not entitled to recover in this suit."

Forty-first. That the Court erred in directing the jury to render a verdict for plaintiff, The Pomona Land and Water Company, as follows :

"Gentlemen of the Jury : I think there are no questions of fact to be submitted to you in this case. I shall therefore instruct you as a matter of law to return a verdict for the plaintiff for seventy-nine thousand eight hundred nineteen and 30-100 dollars."

ARGUMENT.

I.

The contracts stated in the first forty counts.

First. Each of these contracts provides as follows : That in consideratiou of the purchase price to be paid by the de-

fendant, the plaintiff, after the making of the payments and full performance of the undertakings to be made and performed by the defendant, will, in consideration thereof, convey by deed of grant, bargain and sale to the defendant, the lands described, together with the number stated of shares of stock of the Irrigation Company named, representing the number of inches of water stated; "said stock to be delivered by the party of the first part, and accepted by said party of the second part, subject to the by-laws of the Irrigation Company, when payment in full is made for the above described land."

The only undertakings on the part of the defendant affecting the conveyance to be made by the plaintiff, are the covenants to pay the purchase price.

From these terms it appears that the plaintiff is to do two acts, viz: Convey by deed both the land and the shares of stock in the Irrigation Company, and second, to deliver the stock. The contract says, the plaintiff will, after the making of the payment, convey by a deed and will deliver the stock, "when payment is made in full for the land."

We contend that the intent is, that upon payments being made, and when they are made, the conveyance and delivery of the stock will be made. The acts are to be concurrent, the undertakings are dependent.

Time, also, is made of the essence of the contract, and is applicable to both parties.

Under these provisions, in order for the plaintiff to recover, in an action at law, the purchase money, after the last payment became due, the plaintiff must aver and prove that on the date when the last payment became due, the plaintiff ten-

dered to the defendant a conveyance of the land and shares of stock and tendered the stock itself.

The fact that defendant had taken possession of the land and that after the last payment was due he had declined to pay, does not release the plaintiff from the necessity of this averment and proof.

Bank of Columbia vs. Hagner, 1 Pet., 455.
7 Curtis, 661, 664 to 667.
Washington vs. Ogden, 1 Black, 450, at 455, 456, 458.
Hill vs. Grigsby, 35 Cal., 656, 657, 658, 661 to 663.
Bohall vs. Diller, 41 Cal., 532 at 534, 535.
Englander vs. Rogers, 41 Cal., 422.
Heim vs. Treadwell, 72 Cal., 220.
Johnson vs. Wygant, 11 Wend., 49 at 51.
Parker vs. Parmelee, 20 John., 129 at 130, 134.
Kane vs. Hood, 13 Pick., 281 at 283, 284.
Carman vs. Pultz, 21 N. Y., 547 at 549.
Berryhill vs. Byington, 10 Iowa, 223.
Nelson vs. Nelson, 75 Iowa, (38 N. W., 134).
Goodwin vs. Morry, 111 Ind., 68, (12 N. E. R., 82).
Powell vs. Dayton, S. & G. R. Co., 12 Pac. R., 666, (Oregon).
Ackley vs. Richman, 10 N. J. Law, 305.
Egbert vs. Chew, 14 N. J. Law, 447.
Steinn et al., vs. Roberts, 20 N. J. Law, 443.
Biddle vs. Coryell, 18 N. J. Law, 377 Cont., payable in installments.
Headly vs. Shaw, 39 Ill., 354.
Eddy vs. Davis, 116 N. Y., 247, at 252, 253.
Beecher vs. Conradt, 13 N. Y., 108.

Upon no subject, perhaps, has there been greater diversity and confusion in the decisions of the Courts than upon the question whether in cases of land contracts, the undertaking of the vendor to convey the land and of the vendee to pay the purchase money were dependent or independent covenants.

In the case of the Bank of Columbia vs. Hagner, 1 Peter,

455. 7 Curtis. 661. the Court lays down a rule which is simple. clear and easy of application. If it is adhered to by this Court it forbids the plaintiff's recovery.

The Court say (7 Curtis. p. 664). in contracts of this description. the undertakings of the respective parties *are always considered dependent. unless a contrary intention cleary appears.* A different construction would in many cases lead to the greatest injustice. and a purchaser might have payment of the consideration money enforced upon him. and yet be disabled from procuring the property for which he paid it.

Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent ; yet it is evident the inclination of the Courts has strongly favored the latter construction as being obviously the most just.

The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence. in such cases. if either a vendor or vendee wishes to compel the other to fulfill his contract. he must make his part of the agreement precedent. and cannot proceed against the other without an actual performance of the agreement on his part. or a tender and refusal.

Again the Court says (p. 666): "From these authorities it may be laid down as a settled rule that, at law. to entitle the vendor to recover the purchase money he must aver in his declaration a performance of the contract on his part. or an offer to perform at the day specified for the performance. And this averment must be sustained by proofs unless a tender has been waived by the purchaser."

The same rule is distinctly applied in Washington vs. Ogden, 1 Black, at 458.

In Hill vs. Grigsby, 35 Cal., 658, the instrument provided that the plaintiff should convey "*as soon as*" the purchase money is paid. The purchase money was payable in installments, and the suit was brought after the last installment became due. The defense was that no tender of conveyance had been made.

The Court say (p. 662): "In a contract for the sale of real estate where the purchaser covenants to pay the purchase money and the vendor covenants to convey the premises *at the time of payment*, or *upon* the time of payment of the money, or *as soon as it is paid*—and they all mean the same thing—the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform on his part, and performance, or the offer to perform, on the one part is a condition precedent to the right to insist upon performance on the other part.

The Court then quotes the rule stated in Bank of Columbia vs. Hagner as above quoted and the reasons given for the rule.

In Bohall vs. Diller, 41 Cal., 532, the terms of the contract were that the plaintiff, "*upon payment* of the purchase money," was to convey. The decision followed the above case of Hill vs. Grigsby.

The rule laid down in Bank of Columbia vs. Hagner is made the rule in California where these contracts were made.

In the very recent case of Powell vs. Dayton in the Supreme Court of Oregon, 12 Pac. R., 665, the rule is quoted from Bank of Columbia vs. Hagner. The Court also adds that "In construing contracts it is a primary rule that the intention of the parties must control, and this equally applies

when the inquiry is directed to ascertaining whether the covenants in a contract are dependent or independent. It must be said, however, that *when the language of the contract will admit of it*, justice and general convenience incline to the construction of a simultaneous performance."

2 Bingham on Real Property, p. 729, states the doctrine in this language: "It is a rule uniformly concurred in by all modern cases, that when, by the terms of a contract, the stipulations of both parties are to be performed on the same day or at the same time, they are to be regarded as immediately dependent. The application of that rule is to be carried out, unless a different intention is expressed in the agreement, or fairly to be implied from its provisions. But the idea of deducing the intention of the parties to make covenants independent when their performance is appointed for the same time, because one preposition may have been used instead of another, in indicating the concurrence of the acts, is now abandoned by the courts."

See also the cases in 116 N. Y. and 13 N. Y. cited above.

Reliance is placed by the plaintiff upon the use of the preposition "after" in the contract in stating the time when the deed of conveyance is to be made. But the use of one preposition instead of another is not to govern, as we have seen. If from the whole instrument it does not clearly appear that it was the intention of the parties that the covenants should not be dependent, they are to be held as dependent. In this case, taking all the provisions for conveyance into account, the intention is clear that the conveyances by the plaintiff are to be made at the time of the payment of the last installment.

The contract is explicit in statement that the stock of the Irrigation Company is to be delivered to the defendant *when payment* in full is made for the above described land.

This is an instrument separate from the deed of the land: it is a title to the water right, and its delivery is made concurrent with payment, and the plaintiff cannot recover without the delivery or tender of the stock, whether the deed be tendered or not.

If the delivery of the deed is to be treated as an act separate from the delivery of the stock, then recovery cannot be had because of a failure to tender the stock. If the delivery of the deed and stock are to be made at the same time, then the time of delivery is made concurrent by the explicit language relating to the stock.

The only averment on this subject in the declaration is that the plaintiff has been at all times, and is now, ready and willing, upon making the payments, to convey by deed the property described, together with the shares of stock.

Within all the cases, this is not a sufficient averment to meet the requirements of the law. There are no proofs made in the case of any tender of any deed, or of any offer or tender of any stock. The last payment on the contract became due April 8th, 1889, and the suit was not begun until August 27th, 1889.

The question distinctly presented under these facts is of the necessity of the averment and proof on the part of the plaintiff of the tender of the conveyance of the land and of the stock, and of the delivery of the stock, at the time the last payment on the contract became due.

The Court, upon the trial, held such averment and proof unnecessary.

II.

Each of the contracts provides that the plaintiff shall deliver stock in the Irrigation Company named in the contract, representing the amount of water at the rate of one inch for every one hundred shares of stock, measured from the center of aperture, *when payment is made in full for the land.*

This stock is the title to be given to the defendant of the water right which he purchases, and is as much required as the conveyance of the property purchased as the deed is required as a conveyance.

It is insisted that the plaintiff cannot recover on any of these contracts without averment and proof of the tender of *such* stock on the day when the last payment became due. The authorities above cited are to this point.

There is no averment whatever of a tender, or readiness to deliver the stock itself, in either of the Irrigation Companies.

The stock to be delivered to the defendant is a *particular stock described in the contract*, which stock is to represent a certain amount of water measured in a certain way.

It is contended that the declaration should aver *the ability of the plaintiff to deliver such stock* as well as a tender of it, and that proofs should be made to sustain the averment in order to warrant a recovery.

The defendant is not bound to accept a defective title.

See particularly Washington vs. Ogden, 1 Black, 450 at 456, 458.
Bank of Columbia vs. Hagner, 1 Pet., 455.
Swan vs. Denry, 22 Pick., 485 at 488.
Courtwright vs. Deeds, 37 Ia., 508 at 513, 514.
Linton vs. Allen, 6 N. E. Rep., 596.
Brownell vs. Jackson, 9 N. Y., 435 at 539 to 546.
Eddy vs. Davis, 116 N. Y., 247 at 251.
James vs. Burchell, 82 N. Y., at 108.

In Washington vs. Ogden, the action was brought in debt to recover thirty-five thousand dollars claimed to be due on an agreement whereby Ogden, trustee of Chicago Land Company, agreed to sell Washington & Turner certain land described in the John S. Wright contract with the trustees of the Chicago Land Company, dated June 4, 1855, for sixty-seven thousand five hundred dollars, payable thirty-five thousand dollars in sixty days from date of contract and the balance in one, two and three years in equal installments with six per cent. interest payable annually. Ogden agrees that "on pay-of the said thirty-five thousand dollars within the next sixty days, he will make a deed to said Washington & Turner for said property, and take a bond and mortgage on the same for payment of the balance of thirty-two thousand five hundred dollars as above stated. This agreement is to be dependent on the surrender and cancelment of said contract with said Wright."

Mr. Justice Grier says: "It is evident that the covenants of this contract are not independent. They are concurrent or reciprocal, constituting mutual conditions to be performed at the same time. The vendor is not bound to convey, unless the money due on the first installment be paid; nor is the purchaser bound to pay unless the vendor can convey a good title, free of all incumbrance. The agreement shows that the vendor at that time was not able to give a satisfactory title, having a deed on record by which he had covenanted to convey the same land to another. It is therefore made a condition precedent by this agreement, that this previous contract should be surrendered and cancelled. The declaration avers that such previous contract was surrendered and cancelled in due time and that the plaintiff has ever been ready and willing to receive the money at the time and place and *to deliver to defendant a deed of the property*. But there is no averment in the declaration that the plaintiff had a good and sufficient title free from all incumbrances which he was ready and willing

to convey. It is true, the words of his covenant are "that he will make a deed" to his vendees on receipt of the first installment. But the meaning of these words in the contract requires that the deed shall convey the land and it is not sufficient to aver his readiness to perform, merely, according to the letter of the contract. The performance must always be averred according to the intent of the parties. It is not sufficient to pursue the words, if the intent be not performed. The legal effect of a covenant to sell is, that the land shall be conveyed by a deed from one who has a good title, or full power to convey a good title. This defect in the declaration can not be cured by the verdict, under a presumption that the facts necessary to support it have been proved before the jury because it appears by the Record that no such proof was offered to aid the insufficient averments of the declaration. * * * To entitle the plaintiff below to recover in this suit, the declaration should have averred that such deeds of surrender and cancellation (of Wright contract) had been duly executed; that the plaintiff *had a perfect title*, free from all incumbrances and *was able* as well as willing and ready to convey a good title to the plaintiff *on the day named in the agreement*."

Bigler vs. Morgan, 77 N. Y., 312 at 318, 319.
James vs. Burchell, 82 N. Y., at 113.
Eddy vs. Davis, 116 N. Y., at 251.

III.

The evidence in the case in fact shows that the plaintiff was not able to convey and deliver such stock as the contracts required.

There were three Irrigation Companies, the Del Monte Irrigation Company, the Palomares Irrigation Company and the Irrigation Company of Pomona.

The contracts declared upon in the first, third, fourth, fifth and sixth counts, required the delivery of stock in the Del Monte Irrigation Company.

The contracts declared upon in the twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth counts required the delivery of stock of the Palomares Irrigation Company.

The evidence shows, and was undisputed, that water for irrigating the lands sold is essential to the enjoyment and value of the land.

See Record, pp. 165, 166 and 172.

It is clear from this evidence, and the contracts themselves, that the stock is sold as the means of conveying with the land a right or title to water to go with the land, to be used with the land.

While we contend that the plaintiff should itself aver and show that the stock does in that sense represent water, that it conveys a right or title to so much water to the defendant, and there is no such averment or proof on the part of the plaintiff, *the evidence does show in fact that in the case of the last named companies particularly, the stock does not in any sense represent water. It does not convey any right or title to any amount of water whatever.* This appears as follows:

First. The articles of association of these two Irrigation Companies, viz: The Del Monte and Palomares Irrigation Companies are alike in the statement of the purposes for

which the corporation is formed. It is "to acquire water rights, flumes, ditches, aqueducts, reservoirs, and other property that may be necessary or convenient for supplying the water to such person or persons, or their assigns, in the Township of San Jose, County of Los Angeles, State of California, to whom the *Pomona Land and Water Company* has *sold water rights*, or to whom it may hereafter sell *water rights*, or to whom it may transfer *water stock* of this corporation, *and to no other person or persons, whatsoever*. Also to maintain construct and repair all ditches, flumes, aqueducts and reservoirs that may be necessary to the delivery of water to the person or persons hereinbefore described." Each is formed for the term of fifty years, and has five directors.

Record, pp. 193 and 195.

The amount of the capital stock of each company is as follows: In the Del Monte Irrigation Company, four hundred thousand dollars, divided into forty thousand shares of par value of ten dollars each.

Record, p. 194.

In the Palomares Irrigation Company, two hundred thousand dollars, divided into twenty thousand shares of par value of ten dollars each.

Record, p. 195.

In each company the amount of the capital stock subscribed is stated to be five thousand dollars. It does not appear in any way by the articles of incorporation that this subscribed stock, or any part of it is paid.

This is the substance of the articles of association of each of the companies.

By this it appears that the capital stock is like the capital stock of any corporation. It simply represents the property generally of the company.

It does not entitle the holder to have or control any water whatever.

The company is not formed for delivery of water to stockholders. They are expressly excluded from those to whom water shall be delivered by the company. The persons to whom water is to be delivered being confined and limited to such *as the plaintiff has sold water rights*, or to such as it *shall sell water rights*, or to such as it may transfer water stock of the company.

The date of the articles of association of these two companies is February 21st, 1887.

There is nothing said in the articles about any quantity of water, or that capital stock in any way represents water.

Record, pp. 193, 195.

Second. The by-laws of these Irrigation Companies.

There is nothing in any of the by-laws of either of these Companies which provides that the stock shall represent water at the rate of one inch of water for one hundred shares of stock, or that the stock shall represent water at all.

There is no provision which makes stock a title to any water, or that gives to the holder of stock any right to water at all.

The only provision in regard to the right of stockholders is the right to vote upon the shares of stock, by person or proxy, a majority of the stock to constitute a quorum.

It is the duty of the Board of Directors to cause to be issued to the stockholders, in proportion to their several interest, certificates which are to be signed by the President and Secretary, and certificates "shall be of such form and device as the Board of Directors may direct," signed by the

President and countersigned by the Secretary, "to express on its face its number, date of issuance, and the number of shares for which, and person to whom it is issued."

See Article 3, Sec. 1, 2, 3, 6.
Article 4, Section 3.
Article 5, Section 1, 2.
Article 7.
Record pp. 200, 203.

Article 9 provides that stock can not be transferred except on the transfer of land on which the water represented by the stock is issued. Provided, that the corporation or its stockholders may transfer their stock to the Pomona Land and Water Company, or to a trustee for that Company without any transfer of land, and the Pomona Land and Water Company, or its trustee, may transfer any of the stock without any transfer of land.

The by-laws of these two companies are duplicates, and are dated April 13, 1887.

These by-laws give no rights to the stockholder to demand or have any water.

The by-laws cannot control the provisions of the articles of incorporation as to the purposes of the company, and the articles of incorporation are distinct to the point that the business of the company is to furnish water to persons to whom the plaintiff has sold, or may sell, water rights, or to whom it may transfer water stock, and to no other person whatsoever.

Taking the articles of incorporation and the by-laws together, and there is no provision as to terms, price or conditions upon which water will be furnished, nor as to quantities

in which it will be furnished, except so far as such matters may be provided for in the terms of the plaintiff's sales of water rights and water stock.

By the articles of incorporation, the plaintiff may sell the entire of the water to whom it pleases, without reference to any lands or any stock. By by-law 9 the plaintiff may sell the capital stock without reference to water.

Third. The only provision which purports to connect the capital stock with water is by-law 9, which undertakes to limit the *transfer* of stock to the transfer of land, "on which the water represented by the stock is issued." Provided, that the company or stockholders may transfer their stock to the plaintiff, and the plaintiff may transfer the stock without the transfer of land.

Under this by-law 9 all the stock may pass into the hands of the plaintiff, and be sold by it or disposed of by it separate from and independent of any water rights, and of any lands. It may hold it and may transfer it as any ordinary investment stock. The purchaser from the plaintiff in such case may take it as an investment stock.

It is plain that under this by-law the stock does not represent water. It is attempted to make it represent one thing in the hands of one holder, and a different thing in the hands of another holder.

Fourth. This by-law 9, is void and without effect. It attempts to limit the right of the holder of the stock, (unless the holder be the plaintiff) to transfer stock only when a transfer of land is made "on which the water represented by the stock is issued."

It is difficult to say what is intended by this, but the attempted limitation of the rights of transfer is contrary to the express provision of the statute which makes the stock personal property, transferable by assignment, delivery and entry on the books of the Company.

2 Deerings Statutes of California, Sec. 324.

This section provides that "whenever the capital stock of any corporation is divided into shares and certificates therefor are issued, such shares of stock are personal property, and may be transferred by endorsement, by the signature of the proprietor, or his attorney, or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or description of the shares and the date of transfer."

There is no authority in the Statutes of California to make by-laws which change these provisions.

See Sections 301, 303, 354.

The right of transfer of capital stock in the corporation cannot be taken away, or limited by by-laws.

Cook on Stockholders, Sec. 408.
Anglo Cal. Bank vs. Grangers Bank, 63 Cal., 359 at 362 to *364*.
Driscoll vs. West Bradley Mfg. Co., 59 N. Y., 96 at 103 to 107.
Bullard vs. Bank, 18 Wall, 589.
Bank vs. Lanier, 11 Wall., 369 at 376.
Kenebec, &c., R. Co. vs. Knedall, 31 Me., at 477.
Sargent vs. Franklin Ins. Co., 8 Pick., 90 at 95.
Taylor vs. Griswold, 14 N. J. Law, 222 at 227 to 230.
Farmers Bank vs. Wasson, 48 Iowa, 336 at 339, 340.
Pulford vs. Fire Department of Detroit, 31 Mich., 458 at 466.

Ang. & Ames on Corp., Sec. 164.
Morgan vs. Struthers, 131 U. S., at 252, 253.

This attempted limitation of the right to transfer being void, there is nothing which makes this stock different in its character from the capital stock of a gas company, a railroad company, or any other corporation, as representing property, or property rights. It does not, and can not represent any right to a specific amount of water, or any right to a quantity of water. Yet the plaintiff's contract is to deliver stock representing one inch of water for each one hundred shares of stock, measured from centre of aperture.

Fifth. It is the settled law of the land that the capital stock of a corporation gives the holder "no legal title to the property of the corporation. It only represents the proportion to which the holder is entitled in the distribution of the profits of the business, and in the estate of the corporation on its final winding up."

Kohl vs. Lilienthal, 81 Cal., 378 at 385, 386.
Farrington vs. Tennessee, 95 U. S., 686, 687.
Sanger vs. Upton, 91 U. S., 60, 61.
Van Allen vs. Assessors, 3 Wall., 598.
Pierce vs. Field, 102 Mass., 261.
Plimpton vs. Bigelow, 93 N. Y., 599.
Cook on Stockholders, Secs. 3, 5, 9, 10.

Sixth. In reference to the stock of these two companies, the evidence is distinct that only five thousand dollars is subscribed in each of the companies, and that no part of the sub-

scribed stock has been paid, *and that no other stock has been paid.* This evidence is by F. L. Palmer, the secretary of the two companies, and is undisputed.

See Record, p. 165.

The evidence by the same witness shows that there has been issued by the Del Monte Irrigation Company, and delivered to the plaintiff twenty-one thousand shares of stock, and in the Palomares Irrigation Company six thousand shares of stock.

See Record pp. 169, 173.

There is no evidence in the case showing any consideration for the issuing of this stock by these companies to the plaintiff, *and there is no evidence in the case of any ownership by these companies, or either of them, of any water, or wells or sources of supply of water.*

Under these facts it seems to us very plain that the stock in these Irrigation Companies held by the plaintiff does not represent water, and that the evidence shows that the plaintiff was not on its part able to fulfill the contracts. The evidence shows these two Irrigation Companies to be without any property whatever, and without any resources or means to supply water, yet the Court directed a verdict for the recovery by the plaintiff for the balance of the purchase price upon these contracts, as well as upon all the other contracts sued upon.

The requests to charge in reference to these contracts are requests numbered 14, 15, 22, 23, 24 and 25.

Upon the question of whether the stock of these Irrigation Companies represents water the plaintiff cited upon the trial

the cases of McFadden vs. Board of Supervisors of Los Angeles County, 74 Cal., 571, and Applegarth vs. McQuidley, 77 Cal., 408.

It is submitted that these cases have no bearing upon the question presented.

The case of McFadden vs. County of Los Angeles, 74 Cal., 571, presents the case of a corporation formed for the purpose of supplying water to the owners or occupants of a limited district specified in the articles of incorporation. The by-laws provided for charging the stockholders such sums as would cover the expense of distribution, and the waters of the company were acquired and held to be used on the lands of the stockholders, and no water was to be sold or used on lands not covered by the stock of the company, and water was to be used and sold to no one else but a stockholder.

The sole question in the case was whether the statute providing for the Board of Supervisors fixing the rates to be charged by corporations formed for irrigating purposes applied to this company. It was held that the statute did not apply; that it was intended to apply to such companies as sold or rented water to the general public for profit.

In Applegarth vs. McQuidley, 77 Cal., 408, the only question was whether an allegation in a complaint that a corporation was incorporated "to construct a water ditch for irrigating purposes," was sufficient to show that it was a corporation organized for profit, the question being raised upon demurrer. The Court sustained the demurrer, holding that it would be legal for an "irrigating canal and ditch company to be incorporated to distribute water gratuitously."

It is not contended on the part of the defendant that an irrigation company cannot be formed for the exclusive purpose

of furnishing water to its incorporators or stockholders, nor that the stock of such a company may not be so created as to represent water; on the contrary, it is hereafter pointed out how such a stock may be created as a water stock.

What is claimed is that the evidence shows that the capital stock of the Del Monte and Palomares Irrigation Companies does not represent water at the rate of "one inch of water under four inch pressure, measured from center of aperture," for each one hundred shares of stock, which is the kind of stock in said companies which the plaintiff agreed to sell and deliver to the defendant.

IV.

Under this evidence which has been above pointed out, that nothing has been paid upon the stock, the plaintiff has no title to the capital stock in those companies because of the provisions of the Statutes of California.

First.—The statute forbids the capital stock of any corporation to be issued, except for money paid, labor performed or property received.

2 Deering Stat. of Cal., Sec. 359.
Constitution of Cal., Art. 12, Sec. 1.

Second.—The stock can be issued only when full paid, or when the by-laws provide for issuing certificates prior to the full payment under such restrictions and for such purposes as the by-laws may provide.

2 Deering's Stat. of Cal., Sec. 323.

There is no provision in any of the by-laws for the issue of stock prior to full payment.

The by-laws only have provisions for the issue of certificates, to be signed by the president and secretary. These are such provisions as are necessary for the issue of certificates which are full paid.

Under the statute in order to authorize the issue before payment in full the by-laws should expressly provide the *restrictions* under which, and *the purposes* for which certificates may be issued.

The necessity of the by-laws providing the restrictions under which and the purposes for which certificates may be issued before full payment, is that the company and its creditors may be protected against stock going into hands against whom assessments can not be made for the portions of the stock which is unpaid at the time of the issuing of the certificate.

Third. The stock is made by the statute assessable for its full amount for expenses, for conducting the business, and for paying the debts of the corporation. It is not intended that this can be evaded or avoided.

Sec. 331.

Fourth.—A stockholder is always liable for debts of the corporation to the amount unpaid on his stock.

Harmon vs. Page, 62 Cal., 448 at 457, 458.
Cook on Stockholders, Sec. 42 f, sec. 46 b, sec. 49 c.

Fifth. The statute expressly forbids the dividing, withdrawing, or paying to stockholders any part of the capital stock, except on dissolution of the corporation.

Sec. 309.

This is held by the Supreme Court of California to forbid distributing the property of the company which forms and constitutes its capital.

Kohl vs. Lilienthal, 81 Cal., 378, at 385, 386.

Sixth. The stock is made expressly personal property and transferable as personal property, as above pointed out.

Sec. 324.

Seventh. The companies are formed under the general statute.

Secs. 285, 286, 289, 290.

These provisions of the law, taken together, make these two things clear: First, that it is not designed that stock shall be issued by the corporation in such manner that it may be passed into the hands of parties, before payment, against whom the unpaid portion cannot be assessed and collected for the purpose of paying the creditors of the companies; and second, in order that this end may not be defeated, while certificates of stock may be issued before full payment, it shall be done only under such restrictions, and for such purposes as shall not defeat the above object of the statute.

As the evidence here is undisputed that the stock in the hands of the plaintiff, held by it for the purpose of delivery to the defendant, is unpaid stock, it is clear that it has been issued contrary to the provisions of the statute, and that the plaintiff has no right to make such use of it. It would be in the hands of defendant unpaid stock on which he would be liable.

V.

It is not *capital* stock in the Irrigation companies, but a *water* stock in them which is contemplated by these contracts to be sold and delivered to the defendant.

As pointed out above, the articles of incorporation of the Irrigation companies make the purpose of the companies to be to deliver water to the persons to whom the plaintiff has sold water rights, and persons to whom it may sell water rights, and persons to whom it may sell *water* stock of the companies, and to no other persons whatsoever.

First. The water rights here contemplated would be such rights as the plaintiff should sell, and which would be defined by the agreement of sale.

Second. *Water* stock would be understood to be an instrument which would, by its terms, define the amount of water to which the purchaser of the stock would be entitled, and the conditions upon which it would be delivered. It would be a deed, a certificate, or title paper to a definite quantity of water. Such a paper or instrument might be sold and transferred and the purchaser would by it obtain, like a deed to land, a right to a specific, definite quantity of water.

Such stock would represent water, and represent it according to the terms specified in the instrument.

We contend that upon the face of the instruments introduced in evidence, viz: the contracts sued upon and articles of association of the Irrigation Companies, this is the kind of stock that the defendant is entitled to. By means of such stock the companies issuing it would be responsible to him for the delivery of the water specified in it, but a number of shares of capital stock simply, gives him no such thing.

Third. The defendant offered to show that by the deal of the plaintiff prior to the sale to the defendant it appeared that water stock in this sense was the kind of stock which the plaintiff was selling, and selling in these same companies, or selling in view of being issued and furnished by these same companies. For that purpose the defendant offered in evidence a deed from the plaintiff to Charles W. Brown, dated September 5, 1884, and a certified transcript of a large number of other deeds which were substantially in the same form and which showed as follows:

First, a resolution of the directors of the plaintiff for the sale of the parcel of land described, and a water right, specifying the water right as follows: "Said land having the following water right: An amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture, to each ten acres of land, and a proportionate amount for each fraction thereof; said water to be delivered from the aqueduct of the company in heads of no less than twenty-five inches, and within one-quarter of a mile of said land. The party of the first part reserves the right of way for laying pipes and aqueducts for conveyance of water; also, the right to enter upon said lands to make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace and control the same. Said water right shall be subject to an annual charge for repairs of pipes and aqueducts and expense of distribution. Said water right to be exchanged by the purchaser for water stock of a corresponding value in a water company to be organized and its stock to be issued on or before the first day of August, 1886."

Following this resolution is the granting clause of the deed granting "all that certain piece or parcel of land, together with the water rights described in the copy of the resolution

prefixed, which said resolution is hereby referred to for further description and made a part of this deed."

Of deeds of the above form the defendant offered eighteen in number.

Record, pp. 167, 168, 206.

The defendant also offered for the same purpose deeds in the same form except that the Irrigation Companies in which the water stock was to be issued are the Del Monte Irrigation Company and the Palomares Irrigation Company. In this last form the land is sold with the water right, in which the water right and water stock are specified as follows, viz: "With the following water right, an amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture, to each ten acres of land and a proportionate amount for each fraction thereof. Said water to be delivered from the aqueducts of the company in heads of not less than twenty-five inches and within one-quarter of a mile of said land, and the amount to be subject to a reasonable deduction in time of scarcity arising from causes beyond the control of the Pomona Land and Water Company. The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water, also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace and control the same. Said water right shall be subject to an annual charge for repairs of pipes and aqueducts and expense of distribution. Said water right is to be exchanged by the purchaser for *water* stock of corresponding value in the Del Monte Irrigation Company, a corporation duly incorporated February 21, 1887."

Record, pp. 214 and 216.

By these instruments there was sold a definite, specified

amount of water which the plaintiff undertook to deliver, *and this was a water right.* While it stood as a water right the defendant had nothing to do except to receive the water, subject to a specified charge for repairs and expenses of distribution; paying those charges, he was entitled to the water at all times, and the plaintiff was responsible to him for its delivery. The defendant assumed no responsibility as a stockholder, of any kind.

This water right was to be exchanged for *water stock of a corresponding value in the Del Monte Irrigation Company.* He would not be required to accept anything as a water stock in the Del Monte Irrigation Company in place of the above specified water right which for any reason whatever made the stock not of a corresponding value. If it was a stock that cast upon the purchaser the liability and responsibility of a stockholder it could not be of a corresponding value.

Now, the liability and responsibility of a stockholder of capital stock includes the liability above pointed out to pay any unpaid portion of the stock, but, under the statute of California, the owner of capital stock is expressly made liable personally for all debts of the company contracted while he was a stockholder.

2nd Derring's Statutes, Sec. 322.

A water stock of corresponding value with the water right agreed to be conferred could not cast upon the holder of the stock any such liability. Again, as a holder of the capital stock, he himself becomes a party personally responsible for the delivery to himself of the water which he has purchased, while the water right provided for is a right to water to be furnished by the plaintiff alone.

This evidence was offered for the purpose of showing what the paintiff itself had treated as water stock, and dealt in as

water stock, and which has become defined as water stock, and was the water stock contemplated by the contract. When there has been sold both water rights and water stock in these companies, how can it be true that the capital stock represents water in the definite quantity of one inch to each one hundred shares?

VI.

The nine applications for purchase which are declared upon in counts forty-one to forty-nine inclusive, of the declaration.

They are not like the other contracts sued upon, set out literally in the declaration. They are in the same general form which is as follows:

APPLICATION OF PURCHASE.

POMONA, Cal., April 15th, 1887.

Received from H. M. Loud, one hundred dollars deposit on application for purchase of northeast quarter (N. E. ¼) of Sec. 35, containing twelve and 6-10 acres of land, according to map of the San Antonio tract, duly recorded in book 3, p. 7 of maps, records of San Bernardino County, with usual water rights pertaining to said tract at the price of two thousand and sixteen (2016) dollars, and on the following terms: one hundred cash deposit as above:

First Payment.	-	$404, within 60 days from date.
Second payment.	-	$756, on or before April 15, 1888.
Third payment.	-	$756, on or before April 15, 1888.

Second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the premises, I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out. And in consideration that the Pomona Land and Water Company has withdrawn from the market the above described land for 60 days, so that the said H. M. Loud may purchase the same at the above agreed-on price; in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages suffered, and the liquidated damages received by said Company on account of the withdrawal of the land from market as aforesaid. Time is hereby declared to be of the essence of the fulfillment ot the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legel or equitable, nor any right to the possession of the above described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

H. M. LOUD. [Seal.]
THOMAS & EASTON. [Seal.]
F. MACPHERSON,
Agent.

1st. By the terms of the applications, there is no undertaking of the plaintiff expressed. It is, first, a receipt for the amount deposited, providing that a first payment shall be made within sixty days from the date of the instrument, and a second and third payment in one and two years after such date, the whole making up the price at which the land is to be sold, and the defendant agrees to purchase the property on

those terms and in consideration that the plaintiff withdraws from the market the land described for sixty days so that the defendant may purchase the same at said price. In case he fails to make such first payment then the sum deposited is to be retained by the plaintiff as estimated damages. Time is declared to be of the essence of the fulfillment of the obligation by the defendant to purchase the land, then the instrument provides that "no title, legal or equitable, nor any right to the possession of the above described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same."

The intent of this instrument is plain in these features, viz:

1st. The defendant is to have sixty days within which to elect to make the purchase, and he signifies his election to make it by paying the first payment provided for. If he does not pay that first payment the contract is at an end and the deposit is forfeited.

2d. If he does make that payment he thereby elects to make the purchase, and he is then entitled to have executed and delivered to him a contract by plaintiff for the land.

3d. It is made of the express terms of the instrument that this application for purchase itself, the payment of the deposit and the making of the first payment by which the election is signified, does not give any title, legal or equitable, nor any right to the possession of the land. The intention is that he shall only have a right to have a contract. The contemplation is that his right shall be provided for by a contract executed by the plaintiff when said first payment is made by the defendant.

Eddy vs. Davis, 116 N. Y., at 253.

4th. It will be observed that this application is for the sale of the land "with usual water rights pertaining to said tract."

The contract which is to be executed by the plaintiff on the defendant's making the first payment is intended to provide

for the execution and delivery of a deed to the defendant at the proper time, and to define the water rights to be conveyed, also the right of the defendant to the possession of the land, for it clearly contemplates that defendant may have possession. This contract also is intended to provide for the rights and remedies of the plaintiff as a vendor.

Seventh. The declaration alleges that the defendant refused to purchase, to-wit: Neglected and refused to pay the second and third payment. It shows that the deposit and first payment were made. From this it appears, from the declaration itself, that the defendant was entitled to have, and that it was the duty of the plaintiff to deliver to him an executed contract for the lands.

We contend that in order to authorize a recovery by the plaintiff in this suit which was brought after the last payment became due, it is necessary that the plaintiff should aver and prove the execution and tender of the contract to the defendant for the land, as contemplated in this application.

Unless and until that is done by the plaintiff he has no right to the third and fourth payments.

There is no averment in the declaration on the subject, other than this, that the plaintiff "has been ready and willing at all times, and now is ready and willing, to sell unto the said defendant the premises described in the last mentioned agreement upon payment by him of such sum of money by him as aforesaid agreed to be paid therefor." No evidence was offered in the case of any execution or tender by the plaintiff of the contract to the defendant for the land.

We submit that under the authorities before cited the plaintiff is not entitled to recover upon these applications.

VII.

The forty-ninth count is upon an application to purchase lot eleven, according to the map of the Northeast Pomona Tract, for ten thousand two hundred twenty-five dollars, on the terms of five hundred and ten dollars deposit, two thousand forty-five dollars first payment in sixty days, three thousand eight hundred thirty-five dollars second payment, on April 8th, 1888, three thousand eight hundred thirty-five dollars third payment, on April 8th, 1889.

The declaration avers, page 133, that the defendant did not perform the agreement and did not purchase the property.

It avers that the defendant did not, within sixty days pay the two thousand forty-five dollars and has not paid the same, but has only paid one thousand dollars thereon and has refused to pay the plaintiff the ten thousand forty-five dollars of such payment.

It further avers that the defendant took possession of the land, and relying upon his performing the contract, the plaintiff suffered him to take possession and constructed a pipe line to the premises.

It avers the readiness of the plaintiff to sell the land to the defendant upon the payment by him of the sums of money by him agreed to be paid.

Record pp. 132 and 133.

Like the other applications above referred to, the express condition of this instrument is that in case the defendant fails, or refuses to make said first payment of two thousand forty-five dollars within the sixty days, the deposit of five hundred and ten dollars shall be retained by the plaintiff as stipulated damages.

The failure to make the first payment ends the right of

action at law of the plaintiff. The contract does not give to the plaintiff a right of election in the matter at all, it leaves it for the defendant to make the first payment or not to make it as he may choose. If he does not make it, the contract ends. If he does make it then he is holden for the last two payments.

The case is not in equity and the plaintiff's right to recover is upon the terms of the contract itself, and that the plaintiff became entitled to the money sued for by those terms. In fact the defendant made the first payment in part and not in full. It did not deprive him of his election not to purchase by a failure to pay the balance.

The payment of a part of the first payment and the taking possession of the land was not an election within the terms of the contract and the plaintiff has no right under the contract to insist that it is an election.

If the defendant had not paid any part of the first payment, and yet, either before or after the sixty days had expired, he had gone into possession, it would not have been the election provided for in the contract and would not entitle the plaintiff to recovery.

We insist that whatever the plaintiff's remedy may be in equity, or by ejectment, to remove the defendant from the land, he has not the right to recover in this case the purchase money. He has only the right to retain the deposit and so much of the first payment as has been paid to him. Without submitting any question of fact to the jury, the Court charged that the plaintiff was entitled to recover on these facts.

VIII.

For the purpose of showing that the plaintiff had not the title to the land in question lying within Los Angeles County,

the defendant offered in evidence a certified transcript of the patent from the United States to Henry Dalton, Ignacio Palomares and Ricardo Vejar, of the San Jose Ranche.

The evidence shows that the lands in question under this contract, situated in Los Angeles County, are a part of this ranche.

Record p. 168.

The transcript offered is a transcript from the Recorder of Los Angeles County, and the instrument was rejected by the Court for the reason that the seal of the Recorder, attached to his certificate, had no impression upon it.

The instrument is certified under Section 906 of the Revised Statutes of the United States, which provides that exemplifications shall be admitted "by the attestation of the keeper of the said record or books, and the seal of his office annexed, if there be a seal, together with the certificate of the presiding Justice of the court, county, parish or district in which said office may be kept, that said attestation is in due form and by the proper officer."

The transcript has annexed to it the certificate of the County Recorder of Los Angeles County, which certificate is in the following form :

"STATE OF CALIFORNIA, }
COUNTY OF LOS ANGELES, } ss.

I hereby certify the foregoing to be a full, true and correct copy of the instrument appearing recorded in Book No. 2 of Patents, page 268, Records of Los Angeles County, and that I have carefully compared the same with the original record.

In witness whereof I have hereunto set my hand and affixed my official seal this 11th day of April, 1890.

JOHN W. FRANCIS.
County Recorder."

Record p. 230.

To the left of the name of John W. Francis appears a seal, circular in form, composed first of red paper affixed to the certificate, and upon such red paper a golden or bronze colored paper affixed as a postage stamp is affixed to an envelope with mucilage. There is no impression made in said two papers constituting the seal.

An examination of the statutes of California fails to disclose that the County Recorder has any official seal. None is prescribed by law.

It is contended, first, by the defendant that this seal is a surplusage, that the certificate would be entirely good under the statute, without any seal annexed; second, that if the office had a seal *de facto* the certificate of the County Recorder shows that this is his official seal.

Annexed to the instrument and following the certificate of the Recorder are the following certificates, viz :

"STATE OF CALIFORNIA, } ss.
COUNTY OF LOS ANGELES. }

I, J. M. McKinley, do hereby certify that I am Presiding Judge of department number 6 of the Superior Court of Los Angeles County, California, and do further certify that the attestation to each of the copies of instruments hereto annexed, the same being copies of deeds appearing upon the records of deeds of said county, in book 6, at page 434 ; in book 7 at page 619 ; in book 35 at page 635 ; in book 125 at page 21; and book 126 at page 82, respectively, and copy of patent appearing upon the records of patents of said county, in book 2 at page 268, is in due form and made by the proper officer, and that each of the instruments of which the annexed purport to be copies conform to the laws of the State of California, and is entitled by said laws to record in said office.

[SEAL.] J. W. McKINLEY.

Record p. 231.

STATE OF CALIFORNIA, } ss.
COUNTY OF LOS ANGELES. }

I, C. H. Dunsmoor, do hereby certify that J. M. McKinley, whose name is signed to the annexed certificate was at the time of signing the same, duly commissioned, qualified and acting as presiding Judge of Department number six (6) of the Superior Court of the County of Los Angeles, State of California, and I further certify that his signature thereto is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Superior Court this 14th day of April, A. D., 1890.

[SEAL.]

C. H. DUNSMOOR,
County Clerk and Ex-Officio Clerk of the Superior Court of Los Angeles County, of California."

Record p. 231.

It will be seen that the certificate of the presiding Judge, J. W. McKinley, avers that the attestation of County Recorder above referred to is in due form and made by the proper officer.

We submit that the Court erred in rejecting this evidence.

IX.

We have covered all the assignments of error in the foregoing discussion, and submit that the judgment of the Court below should be reversed and a verdict directed for plaintiff in error.

BENTON HANCHETT,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 30 1893
JAMES H. McKENNEY,
CLERK.

CASE No. 14,170.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

Term No. 194.

HENRY M. LOUD, PLAINTIFF IN ERROR,

vs.

THE POMONA LAND & WATER COMPANY.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

Brief for Defendant in Error.

DON M. DICKINSON.
Of Counsel.

HENRY M. DUFFIELD,
Attorney for Defendant in Error.

RECORD PRINTING CO., DETROIT, MICH.

OCTOBER TERM, 1893.

SUPREME COURT OF THE UNITED STATES.

TERM No. 194.

HENRY M. LOUD,
Plaintiff in Error,

vs.

THE POMONA LAND & WATER COMPANY.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

Henry M. Loud, the defendant below and plaintiff in error, agreed to purchase of the Pomona Land and Water Company (defendant in error), a number of acres of land situated in Pomona, California, and described in the contracts sued upon, together with water stock appurtenant to said lands. The contracts were under seal and were in the usual form of such instruments. They were made in 1887 and called for down payments (which he made in full in every case but one and in that case partly made), and for the payment of the balances due in equal annual payments in 1888 and 1889, with interest payable annually. Loud also agreed in them in consideration of being at once let into possession of the lands

that he would pay all taxes, assessments and water rates levied during the pendency of the agreements.

Upon the execution of the contracts he entered into possession of all the lands described therein, caused work to be done on them in laying out new streets, and grading and working existing streets, offered the lands for sale to the public, and exercised all usual acts of ownership over them. He defaulted on the payments due in 1888, and also on the final payments due in 1889.

Upon being called on for these payments he refused to make them, alleging that he had not executed or authorized the execution of certain of the contracts; that he was induced to purchase the lands by misrepresentation and fraud; that the plaintiff had not title to the lands; that the stock in the irrigation companies which the plaintiff offered in connection with the lands was not the kind of stock which the contracts called for; that plaintiff did not own or control sufficient water to irrigate the lands.

The plaintiff below then sued upon the agreements which were embodied in twenty contracts and nine applications, all under seal and in the usual form of such instruments. The declaration (Record, pp. 7-150) in special counts set out the contracts at length, and also stated them according to their legal effect. The applications were stated according to their legal effect.

The declaration averred in every count as in the first (Record, p. 10) that the plaintiff was and had at all times been ready and willing to convey to the defendant by deed of grant bargain and sale the lands and the water stock described in and covered by said contracts respectively, upon the making of the payments and the full performance of the covenants in said contracts expressed to be made and performed by Loud.

The counts in the declaration numbered fifty to sixty-three inclusive (Record, pp. 134-150) declared for taxes levied after the date of the contracts, and paid by the plaintiff. It was stipulated that the demurrer to these counts might be sustained (Record, p. 155), and no evidence was offered or recovery had under them. They therefore cut no figure in the case.

There is no plea in the record and the clerk of the Circuit Court tells me none was ever filed, but a copy of a plea of the general issue, with a notice of special matters of defense, was served upon plaintiff's attorney, which in substance stated:

That if the alleged contracts in the first forty-nine counts were in fact made, they were obtained from defendant by the fraud of the plaintiff, and were void;

That the use and value of the lands depends upon their proper irrigation by artificial means; and to induce plaintiff to make the purchase of the lands, plaintiff represented that it had a good, clear title in fee to the lands; controlled and possessed water and water rights by means of shares of stock in the Del Monte, the Palomares Irrigation Company and the Irrigation Company of Pomona, to furnish ample and sufficient water to fully and sufficiently irrigate said lands so that each parcel of land have water to sufficiently irrigate the same;

Further, that plaintiff, knowing that defendant's only purpose in making the contracts was that he might resell the lands at a profit, represented that it had not any other lands to put upon the market for sale, and after the contracts with defendant would not have and would not place upon market any other lands for sale; that defendant relied on such statements and representations, and was induced by them to make the contracts, whereas they were all false; plaintiff was not responsible, but insolvent and irresponsible; it had not a good title

to the lands, which were heavily incumbered with mortgages so that plaintiff could not convey a good title to them; it did not possess or control sufficient water or water rights to fully and sufficiently irrigate the lands; and water sufficient to irrigate said lands was not represented by means of said stock in the irrigation companies named and could not be furnished by said stock, and the supply of water furnished thereby was not and could not be continuous; that said irrigation companies had not sufficient supplies of water to furnish such water or furnish it continuously or in the quantities represented by plaintiff or called for by the contracts, and were not responsible for furnishing such supply, and such supply was not brought on to or supplied to said lands;

That plaintiff had, and at once after making the contracts, put upon sale large quantities of other lands, and was a competitor of defendant in the market, so strong a one that it prevented defendant from making sale of said lands;

That to some of the lands no water was brought, to some it was not brought in such manner that it could be used, and to none was it brought in sufficient quantities to irrigate them;

That plaintiff was a stranger in California and not acquainted with the laws of the State or the business methods in common use by the plaintiff, and so informed plaintiff, and hesitated to enter into such contracts because he did not know the risk or the extent of the liabilities which he would incur; and plaintiff, further to induce him to make such contracts, stated that they were in a common printed form which it had adopted, and that defendant would not under them, by the laws of that State, incur liability or risk beyond the amounts that he should pay upon the contracts and the loss of the land, and in case of failure by the defendant to make any

payment, the plaintiff would only retain the amount paid, and cancel or foreclose the contract and take the land, and that plaintiff only dealt in that manner in its land sales, and in no event would hold or seek to hold defendant beyond that to any personal liability on the contracts; that defendant relied upon such statements and representations in entering into said contracts, and this suit is in violation of such representations and a fraud upon defendant;

"That the plaintiff did not, on the day when the last installment of the purchase price was made payable by the terms of said alleged contracts respectively, nor at any time, convey or tender a conveyance of the land or stock described in said contracts respectively, or in either or any of them, to this defendant."

Attached to the plea was an affidavit of the defendant denying that he executed the contracts declared on in the twelfth to the twentieth and the thirty-second to the fortieth counts inclusive, and denying that he ever authorized McComas, who signed them as defendant's agent, or any other person to execute the same or either of them.

Notwithstanding this affidavit he admitted on the trial; that he had executed all the contracts and applications (Record, p. 162, f. 297); that he had taken possession and exercised acts of ownership over the lands and was in default on the payments due in 1888 and 1889 on all the contracts and applications (Record, p. 176, f. 320, and 177, f. 321). He objected to the introduction of all the contracts and applications on the ground of a variance (Record, p. 163, f. 298). At the close of the plaintiff's testimony he moved that plaintiff be non-suited for the reason that it had not made a case nor shown any tender of performance on its part or ability to perform on its part the contracts sued upon (Record, p. 164, f. 300).

The plaintiff produced in the trial court for delivery to defendant duly executed deeds of said lands and certificates of stock in the several irrigation companies. Copies of the latter are set out in the Record, pp. 229, 230.

Plaintiff also introduced evidence showing that the defendant took possession, together with the rest of the lands, of lot eleven of Northeast Pomona tract, which is the parcel covered by the application declared on in the forty-ninth count of the declaration where the first payment had not been fully made, and employed men and teams at work upon the same for about three months, gathering stones, clearing streets, plowing and filling waste and putting up street signs and signs offering the lands for sale, and that defendant otherwise offered the same for sale to the public (Record, pp. 163 and 164).

Defendant's counsel, in opening his case to the jury, claimed in his defense that the contracts called for a particular kind of water stock, and that defendant understood that he was to get under the contracts stock which was a title to so much water, but made no claim that the plaintiff's title to the lands was not perfect(Record, p. 164). The defendant put in evidence the articles of incorporation and the by-laws of the Irrigation Company of Pomona, the Del Monte Irrigation Company, and the Palomares Irrigation Company (Record, pp. 164, 165). He also offered a paper purporting to be a deed from plaintiff to Charles W. Brown (Exhibit 20, Record, p. 167, f. 306) and certified copies of other deeds from plaintiff to third parties (Exhibit 21, Record, p. 173. f. 315), for the purpose, as he claimed, of showing among other things what was understood to be water rights and water stock. It was admitted that these deeds did not cover any of the land contracted to be sold to the defendant and the court excluded them. He also offered to prove by the defendant the representations made to him by the plaintiff's

agent to induce him to make the purchase, which he stated in substance were that the plaintiff sold the water with the land, that Mr. Loud would get a good title to the water as well as to the land, substantially what is stated in the circular Exhibit 18 (Record, opposite page 206) and that Mr. Loud took these contracts relying on the fact that he had got such title (Record, p. 175, f. 317 and 318). Plaintiff's counsel objected to this testimony and the objection was sustained by the court. He also offered to show that plaintiff's agent represented that there would be no personal liability on the contracts (Record, p. 175, f. 318. Defendant's counsel also excepted to the ruling of the court striking out the testimony of the defendant Loud that he had no knowledge whatever of the by-laws of either of the irrigation companies (Record, p. 175, f. 319) and to the striking out by the court of the testimony of the defendant Loud that he had done nothing to the land since the fall of 1888 (Record, p. 177, f. 321). The defendant also offered in evidence a paper purporting to be a certified transcript of a patent dated January 20th, 1875, from the United States to Henry Dalton and others, of the San Jose Ranche (of which the lands in question are a part), for the purpose of showing that plaintiff had not title thereto, to which the plaintiff's attorney objected, 1st, because there was no official seal attached to the paper which appeared to be certified by John W. Francis, Recorder, but only a blank wafer; 2nd, because the paper purporting to be the certificate to the official character of the County Recorder appears to be made by the presiding judge of Department No. 6 of the Superior Court of Los Angeles County, California. The trial court sustained the objection and refused to admit the transcript in evidence (Record, p. 174, f. 316).

Defendant's counsel presented twenty-seven requests to charge (Record, pp. 178-182), the legal questions arising

under which are stated later in the brief. The Court directed a verdict for the plaintiff for $79,819.30, which was the amount conceded to be due if plaintiff was entitled to recover upon all the contracts and applications.

The defendant moved for a new trial, alleging thirty-four grounds of error (Record, p. 157). This motion was heard by Mr. Justice Brown, then District Judge, who had tried the case, and Mr. Justice Brewer, and was overruled and judgment entered on the verdict, but an order was entered staying execution "until thirty days after plaintiff had deposited with the clerk of the court for the benefit of the vendee all the deeds to the lands and certificates of stock so that defendant may have an opportunity of examining the same to see that the titles are perfect and the transfers of stock are made in accordance with the laws of the State of California." (Record, p. 159). Plaintiff complied with this order and defendant made no objection to the plaintiff's title or to the form of the transfers of stock (Supplement to Record).

The plaintiff in error on taking out the writ of error filed forty-one assignments of error (Record, pp. 231 to 234). Up to this date I have received no copy of the brief of his counsel, and assume that he relies on the same grounds submitted on the argument of the motion for a new trial in the court below. These are covered by the following propositions then made by him.

As to all the lands covered by the applications.

That the plaintiff should have averred and proven, 1st, a delivery or tender of an executed contract for the lands and water rights described in such applications upon the payment by the defendant of the first payment. 2nd, a tender by the plaintiff to the defendant of a deed for the lands and water rights described in the contract. 3d, what were the water rights described in the contract and a tender of a contract or

deed for such water rights. 4th, that the plaintiff was the owner of such water rights and an offer or tender to the defendant of a conveyance of the title to such water rights. 5th, that the plaintiff had good title to the lands described in such contracts and a tender of a conveyance of such title to the defendant.

As to all the lands covered by the contracts;

That plaintiff should have averred and proven, 1st, that it had good title to the stock described therein, and a tender of the conveyance of such title. 2nd, that it had good title to the lands described in the contracts and a tender of conveyance of such title to defendant at the time the last payment upon such contract became due or subsequently. 3d, a tender of a deed to the defendant by the plaintiff of the lands and stock described in said contract, or a reason why such tender was not made. 4th, that the stock in the several irrigation companies represents a title to water in the amount of one inch under four-inch pressure measured from the center of aperture for each one hundred shares of stock, and that such stock shall convey title to the defendant of such water, and that plaintiff tendered such stock to the defendant. 5th, that the evidence fails to show that the stock described in the contracts declared upon represents the water or title to the water as declared by the contracts.

That as to the contract declared on in the 49th count the plaintiff is not entitled to recover because the first payment was not fully made.

I.

As to the claim that plaintiff did not tender a conveyance of the lands and stock before bringing suit.

The language of the clauses in all the contracts pertinent to this question is *mutatis mutandis*, the same as in the contract set out in the first count (Record, p. 7); namely: "In consideration of $2,539, paid by the party of the second part (defendant below), the party of the first part (plaintiff below) does covenant and agree that after the making of the payments and full performance of the covenant hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale to the party of the second part, his heirs or assigns, the following described real property (describing it), together with 406.02 shares of stock of the Del Monte Irrigation Company, representing four and 62-100 inches of water under 4-inch pressure measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Del Monte Irrigation Company when payment in full is made for the above described lands." * * * "And for and in consideration of the foregoing agreement and as the purchase price of the above described premises, the party of the second part covenants and agrees to pay to the party of the first part, its successors or assigns, the sum of $10,155.00, United States gold coin, to be paid in the following manner:

$2,539.00 on or before the delivery of this contract.

$3,808.00 on or before April 8th, 1888.

$3,808.00 on or before April 8th, 1889, and interest upon said respective sums from April 8th, 1887, until paid," * * * payable annually.

A subsequent clause of the contract provides: "And it is hereby expressly covenanted and agreed between the parties hereto that this instrument is not and shall not be construed as a conveyance equitable or otherwise, and that until the delivery of said final deed of conveyance or tender of all payments precedent thereto, the party of the second part, his heirs or or assigns, shall have no title equitable or otherwise to said premises."

"It is further expressly agreed that time is of the essence of this contract."

The counts upon the contracts averred that the plaintiff "has been at all times and is now ready and willing" * * * "to convey by deed of grant, bargain and sale" to the said defendant the property described in the contracts.

The language in the applications bearing on the question is (Record, p. 183): "Received from H. M. Loud ..... dollars, deposit on application for purchase of lands described, with usual water rights pertaining to said tract, at the price of .....dollars and on the following terms: .....dollars cash deposit as above:

First payment, ..., within sixty days from date; second payment, ..., on or before April 15th, 1888; third payment, ..., on or before April 15th, 1889, second and third payments to bear interest from date at the rate of eight per cent per annum, interest to be payable annually. In consideration of the premises I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out." * * * "Time is hereby declared to be of the essence of the fulfillment of the obligation of the said

H. M. Loud to purchase the above land under the terms and conditions above expressed."

The counts, upon the applications, averred that plaintiff "has been ready and willing at all times, and is now ready and willing, to sell unto said defendant the premises described" * * * "upon the payment by him of the said sum of money as aforesaid agreed to be paid therefor."

In consideration of the sums paid on the execution of the contracts on account of the purchase price of the lands, the plaintiff covenants and agrees that it will convey, by deeds of grant, bargain and sale, the lands described and the appurtenant water stock "after the making of the payments and full performance of the covenants * * * to be made and performed by the party of the second part."

The defendant, "in consideration of the foregoing agreement, and as the purchase price of the premises," covenants and agrees to pay to the plantiff the sums stipulated in the contracts, respectively, in two annual installments. The defendant's promise to pay is expressly stated to be made "*in consideration of the agreement*" of the plaintiff to deed, not in consideration of the deed itself. By the express terms of the agreement it is made the duty of the defendant to pay *before* the plaintiff shall convey, and the plaintiff only agrees to deed *after the payments are made* and the covenants performed by defendant. This intention is reiterated by the express stipulation that the "*instrument is not and shall not be construed as a conveyance equitable or otherwise*," and that the vendee "*shall have no title, equitable or otherwise, to said premises until the delivery of said deed or conveyance or tender of all payments precedent thereto.*" If these clauses do not express the clear intention of the parties that the payments are to be made before a deed shall be tendered, then such an intention cannot be put

into English. The relations of the parties, their connection with the subject matter of the contract, to which the Court may look, Rock Island R'w'y. vs. Rio Grande R. R., 143 U. S., 609, (the language of Mr. Justice Brown in this case is almost literally repeated in Stockton vs. Webber, 98 Cal., 433, 439) emphasizes the language.

The defendant did not live in California, but in a distant State. It must entail considerable expense to the plaintiff to tender a deed to him, while under the contract, the purchase price was payable in Pomona, the business residence of the plaintiff corporation. Although defendant was not in Pomona and could not be tendered a deed there, yet he was in possession and in full enjoyment of the premises. He had the right to resell and possibly had resold some of the premises. He had agreed to pay the 1888 installment, which is a part of the claim in suit, on a day named in that year. No tender of a deed could be claimed before that payment. He uses precisely the same language as to the 1889 installment. Why should a tender be necessary as to that? It must be conceded that plaintiff could have recovered the installment due in 1888 without any previous tender if he had sued for them when they matured. Has he lost that right by his forebearance? The law does not encourage multiplicity of suits or hasty litigation. If the defendant was not entitled to a tender before suit for the payments upon which he first made default, does his second default give him greater rights? It seems a singularly anomalous proposition that one can, by repeatedly breaking faith with another, acquire additional rights against him.

The declaration avers the readiness and willingness of the plaintiff, upon the making of the payments and the full performance of the covenants in said contract expressed by the said defendant, to "*convey by deed*

of grant, bargain and sale to the said defendant, his heirs or assigns, the land described in the contract," together with the water stock. This averment is all that was necessary. The defendant has refused to perform his contract; is in default as to the payments due a year before the final payments mature; and has taken and never surrendered possession of the premises.

As it is uncontradicted that defendant took possession of and enjoyed the use of the lands upon executing the contracts and has never surrendered possession, it seems almost unnecessary to discuss the question of tender.

For the California decisions, which are the *lex rei sitæ* and *lex loci contractus*, have firmly established the rule in that State that a vendee in a contract for the sale of lands cannot defend an action for the purchase price unless he has surrendered possession.

Rohrer vs. Bila, 83 Cal., 51, was an action by vendor for the purchase price of lands contracted to be sold. The Court say (p. 54, foot): "A purchaser cannot remain in possession of lands under a contract and at the same time refuse to pay the purchase price. If the title fails or the vendor refuses to convey, an action on the covenants of his contract will give him all the relief to which he is entitled; but to allow him to hold possession and at the same time defend against an action for the purchase price would enable him to hold the land discharged of the obligation under which he acquired it. * * * The law requires him to surrender the possession of the property or prove an eviction therefrom before permitting the defense of a failure of consideration or a suit to recover the purchase price or damages;" citing many cases, including a number of California decisions among them.

Gates vs. McLean, 70 Cal., 42.

Where a contract provided for the vendee's taking possession, held his remedy in case the title of the vendor fails, or he is unable to make a conveyance as stipulated in the contract, is to rescind or offer to rescind the contract and to restore the possession, "if, on the contrary, the vendee chooses to retain possession under the contract, he can only do so on condition that he pay the purchase money and interest according to the contract. In the latter case it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants."

The defendant's promise to pay is in consideration of the plaintiff's *agreement* to deed, and the delivery of the deed is by the express terms of the contract to be "*after*" the making of the payments, which are by the express terms of the contract, to be "*precedent*" to the delivery of the deed.

In cases upon contracts with much less specific language the authorities are unanimous that the tender of a deed is not a condition precedent to the commencement of the action.

In Payne vs. Brown, 37 N. Y., 228, the purchase price stipulated to be paid, like in the case at bar, in a down-payment and the balance in one and two years, with interest, but no time was fixed for the conveyance of the property, held no averment or proof of tender was necessary.

This case is especially in point on the applications, for the agreement was in form a preliminary one, and "to be put in form in the course of this month." No later contract was made, and the defendant made the point that plaintiff should have offered a completed executed contract, but the Court held this was not necessary.

The case also holds that an assertion by defendant of refusal to perform excuses the plaintiff making a tender.

In Adams vs. Wadhams, 40 Barb., 228, where, by the terms of the contract, it was provided that payments should be made previously to the execution of a deed, held it was not necessary for the plaintiff to convey, or offer to convey, before bringing suit, for the last installment.

In Davis vs. Heady, 7 Blackf. (Ind.), 261, it was held that where the time appointed for payment may happen before the time appointed for the conveyance of the property, an action for the money may be maintained without tendering a conveyance.

The action was debt on bond, conditioned to make a good title for land on or before the 1st of November, 1842, provided the payment for the land was made *before* the deed was to be executed.

Blackford, J., says, p. 262: "It appears from the title bond that the plaintiff had expressly stipulated that the purchase money should be paid before he was to execute the deed. It is no defense, therefore, to a suit for the money, that the deed had not been made or tendered."

In Gale vs. Best, 20 Wis., 44, the language of the contract was, if the purchaser "shall first make the payments and perform the covenants hereinafter mentioned on his part to be performed."

Cole, J., on p. 47, says: "Whatever the general rule may be in regard to the right of a vendor to maintain an action for the purchase money on a contract for the sale of real estate without showing performance on his part, or an offer to perform, certainly, under this contract, the appellant was only bound to convey upon the money

being first paid. For the contract expressly makes the payment of the consideration money *a condition precedent* to the right to insist upon a conveyance. The vendee was first to make the payments and perform the covenants on his part to be performed before he was entitled to a deed. Hence the appellant could maintain his action for the amount due upon the contract without showing any conveyance or offer to convey."

In Sayre vs. Craig, 4 Ark., p. 10, it was held that a tender, or offer to convey, was not necessary to sustain an action upon a contract for the purchase price of lands in which the consideration was made payable on or before a day named. The Court, speaking through Lacy, J., said: "It is true, as contended, that there is a strong inclination of the Courts, in modern cases, to favor the doctrine of dependent covenants, * * * still, where the parties, by the nature and terms of their contract, clearly show that each intended to look to his own part of the agreement and to rely on the remedy it afforded, in such cases the performance of the covenant of the one has no reference to that of the other, and hence the Courts are not at liberty, upon such mutual agreements, to make one depend upon the other, but they are bound to construe them separately and independently of each other." Citing many cases.

In Mayers vs. Rogers, 5 Ark., 417: R., by covenant sold and agreed to convey to M. a town lot, provided M. should *first* pay him the full amount of the purchase money, for which M. had executed his bonds. Held, M. could not urge, as a defense, in an action on the bond for the purchase money, that the conveyance had not been made or tendered.

The Court say: "Rogers is not bound to convey the lot sold until the purchase money is first paid by Mayers.

The payment of the money is a condition precedent, and must be performed before a conveyance can be demanded. The law binds every man to perform his contract according to its true intent and meaning."

In Hill vs. Fisher, 34 Me., pp. 143-4, the action was debt on sealed instrument, dated April 14, 1849, by which defendant agreed to convey to plaintiff's intestate, Hill, certain land, upon condition that said Hill should pay defendant therefor in three installments due one at a certain date, one in one year and one in two years from date, with interest annually. The first installment was paid at maturity; the two remaining ones were not paid, and on the 14th of August, 1851, plaintiff tendered defendant the money and interest due thereon, and taxes in arrears, and demanded a deed, which defendant refused, whereupon the action was commenced. The Court find the payment of the installments a condition precedent to the giving of the deed, and they being overdue when tendered, and time being of the essence of the contract, the action would not lie.

In Leftwich et al. vs. Coleman, 4 Miss., 167, where a promissory note, payable at a fixed day, was given to secure payment of purchase money for land, and the payment was to be made *before the deed* to the land was to be executed; held, the covenants were mutual and independent, and that an action would lie on the note before conveyance was made or tendered.

The rule has been stated with approval by this Court in Waterman vs. Banks, 144 U. S., 394. Mr. Justice Harlan, speaking for the Court, says (p. 401, foot): "The demand for a conveyance within a given time—looking alone to the writing—was made by the parties a condition

precedent to the acquisition by J. S. Waterman of an interest in the property. R. W. Waterman did not agree to convey except upon the performance of that condition precedent. The condition being lawful, it is not competent for the Court to dispense with its performance."

The counsel for the plaintiff in error relied in the court below on Bank of Columbia vs. Hagner, 1 Peters, 455, (7 Curtis, 661), but the case does not sustain his contention. The case merely holds that in contracts of this description the undertakings of the respective parties are always considered dependent, "*unless a contrary intention clearly appears.*" The decision recognizes the right of the parties to make their covenants independent.

The facts in the case are not at all similar to those in the case at bar. There was no formal contract, but the transaction was consummated by letter. The plaintiff never had a good title to the lands, and for more than three years delayed answering the defendant's offer of payment. The declaration contained an averment that plaintiffs were able and willing to make a conveyance of good title, and an offer to do so, but as the proof showed this offer was not until nearly two years after the time fixed for performance and four months after notice from defendant that he considered the agreement void because of the delay, the offer was not held good. Moreover, the Court find that plaintiff never had a good title to the land.

The Court was equally divided on the question of whether there was any contract at all. This would have affirmed the judgment below, but as the Court was agreed upon other points, they announced a decision upon them.

Washington vs. Ogden, 1 Black, 450, is also relied upon by defendant's counsel, but it is not a similar case. The agreement to purchase was an offer by the defendant to "give to plaintiff $67,500 for the property described, payable in installments." The vendor agreed to sell the property for the said sum, payable as aforesaid, and "on the payment" of the first installment to make a deed to the vendees and take a bond and mortgage for the payment of the balance, the amount of the purchase price was contingent upon vendee's obtaining all or only a part of the property, and the agreement was expressly made dependent on the surrender and cancelment of a previous contract by the plaintiff for the sale of the same lands to one Wright, without which surrender the defendant vendor could not give good title. This was never done. The Court held that the plaintiff should have averred such surrender and cancelment, and that because of the want of proof of such fact this defect in the declaration could not be cured by the verdict.

Even in contracts not so expressly making the payment of the purchase price a condition precedent to the delivery of the deed, but in which a date is fixed for the payments and no time is fixed for the delivery of the deed, it is held that willingness and readiness to deed is all that need be averred, and, therefore, all that need be proved.

Wilson vs. Ten Eyck, 5 Johns. 78.

By the agreement sued upon A, covenanted to execute a deed in fee for a certain farm to B on the 15th of May, 1808, in consideration whereof B covenanted to pay A a certain sum in several installments, the last of which, $900.00, was payable May 15, 1808. Action was brought for the whole sum to be paid for the farm. The declaration contained no averment of tender of deed or offer of

performance. Held, that the covenants were mutual and independent, and that an offer or tender of a deed was not necessary, but an averment of readiness was sufficient.

In Seers vs. Fowler, 2 Johns, 272, the action was covenant upon an agreement by plaintiff to build a house for the defendant and complete it by the 1st day of November, 1805. Defendant covenanted to pay the plaintiff $750 on or before the 1st day of May, 1805, and the residue as soon as the house was completed. Held, that the covenants were mutual and independent, and plaintiff need not aver performance, quoting Thorpe vs. Thorpe, 12 Mod., 461; Terry vs. Duntze, 2 H. Black, 389.

In Poole vs. Hill, 6 M. & W., 835, which was an action on a contract for the purchase of lands, the purchaser agreed to pay the consideration on or before January 1st, 1840. The declaration averred the readiness and willingness of plaintiff to execute and make conveyance to defendant. Held, that the declaration in covenant brought against the intended purchaser for nonpayment of the purchase money according to the contract, need not aver that the plaintiff offered or tendered a conveyance to the defendant, and that it was sufficient to allege that the plaintiff has always been willing and ready to execute a conveyance.

The leading case on the question whether a previous tender is necessary under contracts in which the vendee agrees to pay a sum of money for lands on a particular day is,

Pordage vs. Cole, 1 Saunders, 320,

where it was held that where A and B agreed that B shall pay A a sum of money for his lands on a particular day, A can bring an action with-

out conveying or tendering a conveyance. This case is carefully reviewed and annotated with the conclusion that the rule by authority is, "if a day be appointed for the payment of money, or part of it, and that is to happen, or may happen, before the thing which is the consideration for the money is to be performed, an action may be brought for the money, before performance, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent."

To the same effect is Gardiner vs. Corson, 15 Mass., 500, and note 504, 505, as follows: "If a day be appointed for the payment of money, and the day comes before the thing for which the money is to be paid is to be done, then, though the agreement be to pay the money for the doing of the thing, yet an action may be brought for the money before the thing is done, because the agreement is positive that the money shall be paid at the appointed date, and it is presumed that the party intended to rely on his remedy, and not to make the performance a condition precedent;" citing Platt on Covenants, 79 to 91, and a number of cases.

This rule is also declared by Holt, Chief Justice, in Thorpe vs. Thorpe, 1 Salkeld, 171.

In Bailey vs. Clay, 4 Randolph, Va., 346, the agreement made the purchase price of the lands payable "one-half at next Christmas and the other half at twelve months thereafter;" held, that in a contract for the purchase of land where no time is limited for the conveyance of the property and a time is limited for the payment of the purchase money, the conveyance is not a condition precedent to the right to demand the money; quoting Pordage vs. Cole, Thorpe vs. Thorpe as cases in point.

In Tenny vs. Duntze, 2 H. Blackstone, 389, A covenanted to build a house for B and finish it on or before a certain day in consideration of a sum of money, which B covenanted to pay A by installments as the building shall proceed. The action was for the whole amount to be paid for the house; held, that the finishing of the house was not a condition precedent to the paying of the money, and that A could maintain an action of debt against B. The Court, Buller, J., say "it is a rule long since established in the construction of covenants that if any money is to be paid before the thing is done, the covenants are mutual and independent."

The Philadelphia Railway vs. Howard, 13 How., 307, although not a land case, is in point. It was assumpsit on covenant broken. Contract to be completed November 1st, 1836; company agreed to pay twenty-six cents per cubic yard for excavation in monthly payments, according to measurement and valuation by engineer. The Court say (page 338): "The covenant to pay at the end of each month for the work done during that month was dependent on the progress of the work, so far as respected the amount to be paid, but was not dependent on the covenant to finish the work by a certain day." And the Court concluded that covenant to pay on a day certain (i. e. at the end of each month) is not dependent on prior performance of labor. The Court say covenants are dependent or independent, as the intention of the parties appears, gathered from the whole instrument, and the fact that payments are to be made on days certain, seems to be the basis for the Court holding their covenants independent.

Pollak vs. Brush Electric Association, 128 U. S., 446, is also in point.

Certain electrical instruments and stock in an electric light company were to be transferred to Pollak. Pollak was to pay a certain sum in cash on execution of the agreement of a certain date and the balance on 1st January following and further sums on certain contingencies.

Citing Philadelphia, etc., Railway vs. Howard, 13 How., the Court holds the covenants independent, from the intention of the parties, as gathered from the instruments.

Even in dependent covenants an averment of readiness and willingness to perform is sufficient.

1 Chitty's Pleadings, 7th Am. Ed., p. 324.

"The promises of each party must, in general, be concurrent or obligatory on both at the same time to render the promise of either binding, and must be so stated in pleading. And in these cases it is not always necessary to aver performance of the thing stipulated to be done, the plaintiff's agreement to perform being a sufficient consideration; unless the performance of one act be the consideration of the performance of the other, in which case an averment of performance, or readiness to perform, is in general necessary, even in the case of mutual promises; as upon mutual promises to marry and bargains to sell and accept goods."

In Gasley vs. Price, 16 Johnson, 267, the covenants were held dependent, but averment of readiness to perform was held sufficient.

De Medina vs. Norman, 9 M. & W., 820.

Agreement to lease, on and from 24th June.

Declaration stating general performance by plaintiff, and that he was ready and willing to let the house to the defendant, and to grant and execute a lease, yet that the defendant did not and would not become his tenant or accept the lease, was held sufficient.

In Hammond vs. Gilmore, 14 Conn., 480, in an action on an agreement for the sale of growing trees, an averment of readiness and willingness to deliver on the part of plaintiff and of a refusal to accept and pay on part of defendant, was held sufficient without allegation of tender or performance.

In Howland vs. Leach, 11 Pickering, 151, the defendant covenanted to pay the plaintiff a sum agreed upon for the sale of a lot and for building a house thereon "when the house shall be finished and the key delivered to the defendant with a satisfactory deed and title free of all incumbrances." The action was for the whole sum to be paid for the house and lot. Held, that the plaintiff was not bound to make a tender of a deed.

As to averment of good title in plaintiff.

The plaintiff's covenant was to "convey by deed of grant, bargain and sale." The averment in the declaration is that the plaintiff "has been at all times, and is now ready and willing" * * * "*to convey by deed of grant, bargain and sale*" to the said defendant the property described in the contracts.

It had been held in California before the making of the contracts in suit that "where the words bargain, sell and quit claim" are employed in a conveyance they operate not merely to release, but to transfer any interest which the grantor possesses at the execution of the deed.

Touchard vs. Crow, 20 Cal., 150.
Muller vs. Boggs, 25 Cal., 175.

It would seem, therefore, under these decisions, that the contracts did not entitle the defendants to a conveyance of a perfect title.

However this may be, the declaration is sufficient. If the covenant to convey by deed of grant, bargain

and sale does not call for the conveyance of a perfect title, then the declaration need not aver a good title in the plaintiff. If it means that plaintiff must convey a good title, the averment in the declaration of readiness and willingness to "convey by deed of grant, bargain and sale" is an averment of good title in the plaintiff. The same words cannot be given one meaning in the agreement and another meaning in the declaration. Besides an averment of readiness to convey a title is an averment of title.

In De Medina vs. Norman, 9 M. & W., 820, it was held on general demurrer that an averment of the plaintiff's readiness and willingness to convey was equivalent to his averment that he had title to the lands.

In Ferry vs. Williams, 8 Taunton, 62, defendant purchased a leasehold estate of the plaintiff at public auction subject to conditions "that the purchaser should pay down a deposit in part of the purchase money and sign an agreement for payment of the remainder within twenty-eight days from the date of sale, when possession should be given, and that the purchaser should have proper conveyance on the assignment of the leases without requiring the leasor's title on payment of the remainder of the purchase money." In assumpsit against the purchaser, held that the plaintiffs are not bound to set out their title, and that allegations that they were ready and willing to convey were equivalent to a performance of the conditions on their part.

Defendant's refusal to perform absolved the defendant from making any tender.

In the case at bar the defendant expressly refused to perform the contracts on his part and repudiated them,

alleging that some of them were not executed by him, and that those he did execute were obtained by fraud, and that the plaintiff had not good title and could not make good title to the lands and had not got title and could not make title to the water stock, and did not control and possess water sufficient to irrigate the lands, without which the lands were valueless; and he defends the action on these grounds. Under these circumstances no averment or proof of a tender of a deed of the land or water stock was necessary.

Where defendant has refused to perform his contract, or waived performance on the part of the plaintiff, the latter may recover without offer of performance, even in the case of mutual and dependent covenants and agreements.

Smith vs. Lewis, 26 Conn., 110, was a suit for breach of a contract containing mutual and dependent promises of plaintiff and defendant; the declaration, after setting out the acts to be concurrently done by the parties on a day named, alleged that plaintiff was on that day ready and willing to perform all the acts to be by him performed. The defendant had wholly refused to perform.

Held, declaration was not insufficient in not alleging offer to perform, since refusal of the defendant superceded the necessity of anything more than readiness and willingness on part of plaintiff; the plaintiff need neither aver nor prove an offer when a refusal of the other party is set forth. An allegation of an offer is superfluous.

In Williams vs. Bank of U. S., 2 Peters, 101, this Court, speaking through Mr. Justice Washington, say: "If a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility

is to arise, dispenses with or by any act of his own prevents the performance, the opposite party is excused from performing a strict compliance with the condition. Thus, if the precedent act is to be performed at a certain time or place and a strict performance of it is prevented by the absence of the party who had a right to claim it, law will not permit him to set up the non-performance of the condition as a bar to the responsibility to which his part of the contract had imposed upon him." The following application of this principle is given: "The holder of a bill or promissory note, in order to entitle himself to call upon the drawer or indorser, must give notice of its dishonor to the party whom he means to charge. But if, when the notice should be given, the party entitled to it be absent from the State and has left no known agent to receive it," * * * "the law dispenses with the necessity of giving regular notice."

Fannen vs. Beauford, 1 Bay, S. C., 238.

Bay, J.: "Where money is to be paid the obligor is to tender it at his peril; but in case of mutual covenants, where there are reciprocal duties to be performed by each party, there the party alleging a breach ought to show that he was always willing and ready to perform what, on his part, he was obliged to do."

Marshall vs. Craig, 1 Bibb, 379.

If the covenantee is the cause, why the covenantor cannot perform his covenant, he is excused, and money to be paid him for performance because due as if he had actually performed.

Conch vs. Ingersoll, 2 Pick., 302.
Miller vs. Drake, 1 Cains, 45.
Granger vs. Dacre, 12 M. & W., 430.
1 Chitty Pleadings, 7 Am. Ed., 358.

If one party, in the course of performance, renounces the contract or renders it impossible of performance, the other is exonerated from making a tender of performance or from making a continued performance.

"It may also happen that, in the course of performance, one of the parties may, by word or act, deliberately and avowedly refuse performance on his part; the other party is then exonerated from the continued performance of his promises, and is at once entitled to bring action;"

Anson on Contracts 2d Am. Ed., 284-5.

Citing Cort vs. The Ambergate R'y Co., 17 Q. B., 127, with notes stating that the rule in this case has been generally followed in this country, citing Hosmer vs. Wilson, 7 Mich., 304; Derby vs. Johnson, 21 Vt., 21; Haines vs. Tucker, 50 N. H., 311; Smith vs. Lewis, 24 Conn., 624; Clement vs. Messerole, 107 Mass., 362; Collins vs. Delaporte, 115 Mass., 162.

In England and in most of the United States the party injured by the refusal can sue at once. The Massachusetts Supreme Court holds otherwise as to the right to sue, but, in harmony with the other decisions, that the refusal exonerates the party injured from making any tender or offer of performance.

A renunciation of the agreement by declaration or inconsistent conduct before the time of performance, may give cause for treating it as rescinded and excuse the other party from making ready for performance on his part or relieve him from the necessity of offering performance in order to enforce his rights.

Daniels vs. Newton, 114 Mass., 533.

Where one party to a contract declares to the other party to it that he will not make the performance on the future day fixed by it therefor, and does not, before the

time arrives for any act to be done by the other party, withdraw his declaration, the other party is excused from performance on his part, or offer to perform and may maintain his action for a breach of the contract when the day has passed.

Shaw vs. Republic Life Ins. Co., 69 N. Y., 292.
Franchot vs. Leach, 5 Cow., 506.
Traver vs. Halsted, 23 Wend., 66.
Canda vs. Wick, 100 N. Y., 127.

Where there is a covenant for the sale and purchase of a farm, the conveyance to be made and the consideration to be paid at a future day, if previous to the stipulated time, the purchaser gives notice to the vendor that he has made up his mind to abandon the contract and not accept a deed, it is not necessary to aver a tender of a deed or readiness to perform.

North vs. Pepper, 21 Wendell, 636.

An offer to perform by one who is ready and willing and free from any conditions to which the other has any right to object is sufficient; and so, also, may a refusal to accept performance, even before any offer thereof, relieve the necessity of a tender unless its effect is subsequently cured by reasonable notice of a change in purpose. The law does not require vain things or an idle ceremony to give the plaintiff a right of action.

Carpenter vs. Holcourt, 105 Mass., 284.

This rule is also declared by this Court,

In United States vs. Lee, 106 U. S., 196, speaking through Mr. Justice Miller, p. 202: "The proposition is thus expressed by this Court at its last term in Hills vs. Exchange Bank, 105 U. S., 319: 'It is a general rule that when the tender of performance of an act is necessary to

the establishment of any right against another party, this tender, or offer to perform, is waived or becomes unnecessary when it it is reasonably certain that the offer will be refused.'"

In Ankeny vs. Clark, 148 U. S., 345, Mr. Justice Shiras, speaking for the Court, says: "It is an invariably true proposition that whenever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract * * * the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a quantum meruit for anything he had done under it previously to the recission."

The language of the covenants in the applications is not so specific as in the contracts, but is sufficiently explicit to bring them clearly within the rule of the decisions above cited.

II.

As to the right of the plaintiff to recover under the 49th count.

In the computation on which the verdict was based, the amount due for the purchase price of lot 11, northeast Pomona tract (being the tract set out in the 49th count in the declaration), is separately computed and stated in the sum of $10,939.13. On the hearing of the motion for a new trial, plaintiff's counsel requested if there should be any serious doubt in the minds of the Court as to the right of the plaintiff to recover under this count, that an order be entered directing a new trial, unless the plaintiff shall remit this sum.

The only difference between this application and the other applications is that the defendant did not pay in full the first payment. It was dated April 8, 1887, and called for the payment of $10,225.00, as follows:

$510.00 deposit.
$2,045.00 in sixty days.
$3,835.00 on or before April 8, 1888.
$3,835.00 on or before April 8, 1889.

Defendant paid the deposit of $510.00 on the date of the agreement, $500.00 June 17, 1887, and $500.00 July 2, 1887, on account of the first payment, making, with the deposit, $1,510.00 of first payment of $2,045.00.

Record, p. 189, f. 342.

He went into possession and exercised all usual acts of ownership of the premises, and has never surrendered possession. The amount due on this application at the trial, and which makes a part of the verdict and judgment, was $10.802.06.

Record, p. 178, f. 322.

The agreement purported to give plaintiff the right to retain *the deposit* as stipulated damages in case the defendant failed to make the first payment within the time mentioned. No right of forfeiture is reserved as to any of the other payments. Whether the law would enforce the forfeiture of the deposit even, under this agreement is very doubtful, but certainly plaintiff could not have retained the additional $1,000.00 paid by defendant as part of the first payment, because there was no agreement to that effect. In Farley vs. Vaughn, 11 Cal., 227, the facts were like those in this case, but the vendor refused to convey on the ground, among others, that the plaintiff had not tendered payment of the purchase price

at maturity or ever paid it; held "that it would be a fraud which no court of equity could tolerate to hold that the defendant receiving a portion of the purchase money, and seeing the plaintiff expend large sums of money improving the property without objection, should insist, because plaintiff had not literally complied with the provisions of his contract on his part, on holding the whole contract forfeited, claim the land and the money paid and all the improvements, and deny all obligation on his part to comply with his engagements."

And in Vassault vs. Edwards, 43 Cal., 466, the court said "there is no exception to the rule that the contract, though signed by both parties, will not be specifically executed at the instance of one party unless performance on his part can also be compelled."

No, such claim was, in fact, made by plaintiff, but the strict performance of the contract was waived and two installments of $500.00 each were received without objection after the $2,045.00 of which they were a part was past due. Both parties continued to treat the agreement in force, notwithstanding the default of the defendant.

The defendant took possession of the lands with the full consent of the plaintiff; caused work to be done thereon; offered portions of the same for sale and placed upon the land signs to that effect; and generally exercised acts of ownership over said lands. Plaintiff rested its case, reserving the right to prove that it had expended a large sum of money in constructing a pipe line to the premises of sufficient capacity to supply them with all the water called for by said agreement, and had delivered the said water in said pipe line, in case the Court deemed it necessary.

There can be no question but both parties agreed that the substituted mode of performance of the contract should take the place of that stipulated for in the written contract.

That this is a contract for the sale of lands, and within the statute of frauds, does not make such agreement void.

The following, among many, authorities sustain the rule that a verbal change of the mode of performance or terms of payment of a contract for the purchase and sale of real estate is valid and binding.

In Cummins vs. Arnold, 3 Metc. 486, it is held that the terms of a written contract for the sale of goods may be varied by a subsequent parole contract, though the original contract was within the statute of frauds.

This case is quoted with approval in a number of cases.

Hastings vs. Lovejoy, 140 Mass., 264-5.

In Kimball vs. Goodwin, 32 Mich., 10, it was held that the time of performance of a written agreement for the sale of lands could be varied by parole.

In Blanchard vs. Trim, 38 N. Y., 225, it was held that the terms of a written contract for the sale of goods, which was within the statute of frauds, may be varied by parole, the original sale furnishing sufficient consideration for the modification.

In Organ vs. Stewart, 60 N. Y., 419, it was held that a contract originally valid within the statute of frauds, because being in writing, may be modified as to time or as to performance, by a subsequent oral agreement between the parties.

In Stearns vs. Hall, 9 Cush., 31-34, it is stated as a general rule that in case of a contract in writing, within the statute of frauds, oral evidence is admissible to show a subsequent oral agreement to enlarge the time of performance, or to vary any other terms of the contract, or to discharge or annul it altogether.

See also Negley vs. Jeffers, 28 Ohio St., 90.
Jackson vs. Litch, 62 Pa. St., 451.

Counsel for the plaintiff in error contended below that as to the water stock an averment and proof of tender was absolutely necessary because the contract is explicit in statement that the water stock is to be delivered to defendant when payment in full is made for the lands. He argues that the shares of stock are instruments separate from the deeds of the land and there must be a tender of them, whether the deed be tendered or not.

As has been seen, the averment in the declaration follows the language of the contracts. Under them the water stock is clearly intended to be appurtenant to the lands to be conveyed. It would be absurd for the plaintiff to claim that he was entitled under the contracts to the payment of any money on the delivery of any stock without the deed of the lands, or for the defendant to claim that he was entitled on payment of part of the purchase money to call for the delivery of the stock, although he was not entitled to a deed of the lands. The stock in the irrigation companies is therefore deliverable simultaneously with the deeds, and there cannot be one rule applicable to the tender of the deeds and another deed applicable to the delivery of the stock. Counsel for the plaintiff in error in this claim in the court below did not give the proper weight to the language with reference to the stock. He stated that the stock was to be delivered to the de-

fendant "when payment in full is made for the above described lands." (Record, p. 8, f. 16.) As we have seen, this is not the true meaning of the contracts. He quotes only the last clause in a sentence containing the agreement of the plaintiff, but it must be read in connection with the previous clause in the same sentence "that after the making of the payments, etc., the party of the first part will in consideration thereof, convey" (the lands described) "together with" water stock, describing it (Record, p. 7, f. 15).

III.

As to the character of the stock in the irrigation companies.

It appears clearly from the record (testimony of Frank L. Palmer, Record, pp. 165, 170, 171, 172) that the Pomona Land and Water Company for many years has been engaged in selling lands and water rights with the lands, and up to the time of the formation of the irrigation companies delivered the water, and had wells, pipe lines, flumes and ditches for that purpose.

When the three irrigation companies were formed the lands to be by them supplied with water were stated in their several articles of association. The Pomona Land and Water Company conveyed to them respectively the quantity of water necessary to supply the requisite amount of water to the lands in their district. In consideration of this conveyance the irrigation company transferred to Frank L. Palmer, as trustee of the Pomona Land and Water Company, all its corporate stock, except a nominal amount issued to the

original incorporators for the purpose of incorporating. This trustee stock was to be transferred only to such person or persons "as may be entitled to the same on account of water rights sold, or thereafter to be sold, by the Pomona Land and Water Company," and the Pomona Land and Water Company agreed to deliver the water to the persons entitled without expense to the irrigation company.

In short, the irrigation companies are but the instruments by which the land company more conveniently conveys to purchasers of its lands the right to water with which to irrigate the same.

The Land and Water Company owned shares of stock in the irrigation companies calling for more than enough water to supply the land sold to Mr. Loud with the amount named in the contract (Record, p. 169).

Counsel for plaintiff in error contends that the stock which the plaintiff below had ready to deliver at the trial was not the kind of stock which it was bound by the contracts to accept. He claims that the contracts declared upon require the conveyance and delivery to the defendant of stock in the several irrigation companies, which "represents water in the amount of one inch of water under four inches pressure, measured from center of aperture for each 100 shares of stock," which "means that such stock shall convey a title to the defendant of such water, and in order to recover, the plaintiff is required to aver in the declaration and prove that the stock does represent and convey title to such amount of water, and that, as the plaintiff has not made such averment and proof, it is not entitled to recover upon the contracts;" that the shares of stock in the several irrigation companies which were produced on the trial entitle the holders thereof to no other rights than those of the ordinary stockholder in a corporation organized for pecuniary

profit; and that under them the holder has no right to any water.

This position of plaintiff in error cannot be maintained. First, the stock in the irrigation companies was precisely what the contracts called for, whether it gives legal title to water or not. Secondly, the stock in the irrigation companies does give a water right within the meaning of the language of the contract.

First, the language of the contracts is (Record, p. 7, f. 17), "together with 406 2-10 shares of stock of the Del Monte Irrigation Company, representing four and 62-100 inches of water under four inch pressure measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part subject to the by-laws of said Del Monte Irrigation Company." A certificate of this kind of stock was offered the defendant (Record, p. 229).

The words "representing so many inches of water under four-inch pressure," etc., are words of description merely, stating the amount of water which the irrigation company undertook to give with so many shares of stock. They do not amount to a guaranty that the stock should actually produce so much water or that the holder of it should at all times and forever be supplied with so much water under it. The defendants' agreement to accept the stock "subject to the by-laws of the company" shows conclusively that he agreed to take just such stock as is represented by the certificates and accepted his rights under them for whatever they were worth.

Secondly, the stock in the irrigation companies does give a water right within the meaning of the language

of the contract. The following provisions of the California code are pertinent.

The code of California provides for the organization of corporations for any lawful purpose.

Deering's Annotated Statutes and Code of California, Vol. 2, Sec. 286.

286. *Corporations may be formed for any lawful purpose.*

Sec. 286. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

Sec. 5 of act cited in note to this section provides for stockholders and members at large of the corporation.

"Sec. 5. Corporations formed under this act may have a capital stock, and may issue certificates to represent shares of such capital stock; *provided*, that the certificate directed in the second section of this act to be executed and filed shall contain a statement of the amount of such capital stock and the number of shares into which it is divided; and provided further, that the rights and privileges to be accorded to stockholders, as distinct from those to be accorded to members at large of the corporation, and the obligations to be imposed upon stockholders in the same relation, shall be fixed and established in the by-laws of each of such corporations."

The distinction between corporations organized for profit and other corporations is recognized in Sec. 290.

290. *Articles of incorporation, what to contain.*

Sec. 290. Articles of incorporation must be prepared, setting forth:

1. The name of the incorporation;
2. The purpose for which it is framed;

3. The place where its principal business is to be transacted;

4. The term for which it is to exist, not exceeding fifty years;

5. The number of its directors or trustees, which shall not be less than five nor more than eleven, and the names and residence of those who are appointed for the first year; provided, that the corporate powers, business, and property of corporations formed or to be formed for the purpose of erecting and managing halls and buildings for the meetings and accommodation of several lodges or societies of any benevolent or charitable order or organization, and in connection therewith the leasing of stores and offices in such building or buildings for other purposes, may be conducted, exercised, and controlled by a board of not less than five nor more than fifty directors, to be chosen from among the stockholders of such corporation, or from among the members of such order or organization; and provided also, that at any time during the existence of corporations for profit, other than those of the character last hereinabove provided for, the number of the directors may be increased or diminished by a majority of the stockholders of the corporation to any number not exceeding eleven or less than five, who must be members of the corporation, whereupon a certificate, stating the number of directors, must be filed, as provided for in section two hundred and ninety-six for the filing of the original articles of incorporation;

6. The amount of its capital stock, and the number of shares into which it is divided;

7. If there is a capital stock, the amount actually subscribed, and by whom.

The only corporations which must state in their articles the percentage of the subscription for capital stock which has been paid in are those specified in Sec. 291.

291. *Certain corporations to state further facts in articles.*

Sec. 291. The articles of incorporation of any railroad, wagon-road or telegraph organization must also state:

1. The kind of road or telegraph intended to be constructed;

2. The place from and to which it is intended to be run, and all the intermediate branches;

3. The estimated length of the road or telegraph line;

4. That at least ten per cent of the capital stock subscribed has been paid in to the treasurer of the intended corporation.

294. *Prerequisite to filing articles of corporations for profit.*

Sec. 294. Before the articles of incorporation of any corporation referred to in the preceding section are filed, there must be paid for the benefit of the corporation to a treasurer elected by the subscribers ten per cent of the amount subscribed.

552. *Right to water, to irrigate lands sold by water or irrigating company.*

Sec. 552. Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation.

The articles of association of the Del Monte Irrigation Company which were put in evidence provided, among other things. (Record, p. 193.)

Second. "That the purpose of which this corporation is formed is to acquire water, water rights, flumes, ditches, aqueducts, reservoirs and other property that may be necessary or convenient for the supplying of water to such person or persons or their assigns in the Counties of Los Angeles and San Bernardino, State of California, to whom the Pomona Land and Water Company has sold water rights or to whom it may hereafter sell water rights or to whom it may transfer water stock of this corporation, but to no other person or persons whomsoever. Also to maintain, construct, and repair all ditches, flumes, aqueducts and reservoirs that may be necessary or convenient for the delivery of water to the person or persons hereinbefore described. Also the right to purchase the privilege of developing water upon any lands in the counties hereinbefore mentioned, and to develop water therein for the uses and purposes hereinbefore stated."

Among its by-laws was the following: (Record, p. 202.)

Article 9—Transfer of Stock.

The stock of this company cannot be transferred except on the transfer of the land on which the water represented by the stock is used, or of a portion of the lands, in which latter case so much of the stock as corresponds to the amount of land sold may be transferred.

Provided, however, this corporation may, or any of its stockholders may, transfer it or their stock to the Pomona Land and Water Company, or to a trustee, for the benefit of the Pomona Land and Water Company without any transfer of land; and provided, further, that

said Pomona Land and Water Company, or its trustees, may transfer any of the stock of this company without any transfer of land.

This by-law is referred to in the body and printed on the back of each certificate of stock. Record p. 229.

Similar provisions exist in the articles and by-laws of the other irrigation companies.

It is clear from these statutes and the articles of association and the by-laws of the companies that the purpose of the corporations and the understanding of their stockholders are that this stock shall call for no dividend or profits but for water rights. The decisions of the Supreme Court of California expressly recognize this kind of corporation stock and point out the distinction between it and stock in ordinary corporations for purposes of profit.

Section 549 of the California code provides for commissioners to determine the rates to be charged for water by all corporations formed to supply water to cities or towns.

Under this section the controversy arose which was decided in McFadden vs. County of Los Angeles, 74 Cal., 571.

In this case the Anaheim Union Water Company was formed for purposes similar to those of the Pomona and other irrigation companies in this case, viz: "Of supplying water for hydraulic irrigating and domestic use to the owners and occupants of a district of twelve thousand acres of land situate in Los Angeles County and contained within certain limits set forth in the

articles of incorporation. By its by-laws the directors were authorized to charge the stockholders such sums for the water as may cover the ordinary expenses of the company.

The waters were acquired and held, to be used on the lands of the stockholders and not for sale, distribution, rental or otherwise and a by-law provided that no water shall be sold or used for any purpose on lands not covered by stock of the company.

Suit was brought to compel the Board of Supervisors to fix the water rates to be charged by the company.

The court below so ordered, but the Supreme Court reversed the order and held that the Board of Supervisors had no such authority; that "the by-laws adopted in their scope and extent do not go beyond the power in the corporation" and "are not inconsistent with the constitution and laws of the State," saying:

"We think the answer shows that the water was acquired and held for the use of the stockholders of the corporation only, and not for sale, distribution or rental to the public generally. Nor is it intended that the water or the agencies used for its distribution were to be sold or rented or used in any way to accumulate a fund from which dividends were to be declared and paid" * * * An individual can certainly acquire water to be used on his own land. * * * We know of no reason why individuals cannot associate themselves to take on a corporate form and acquire water to be used on their own lands."

In Applegartte vs. McQuiddy, 77 Cal., 408, these different kinds of corporations are again distinctly recognized.

This was an action by stockholders to compel directors of a ditch and canal company to account for losses through the alleged fraudulent failure of the directors to sell the water which flowed through the canal. Defendants

demurred generally to the complaint that it did not state a cause of action.

The opinion states that "there was no direct allegation in the complaint that the corporation was organized for profit or that the purposes for which it was incorporated were other than 'to construct a water ditch for irrigating purposes in said Tulare County.'" It was claimed in the case, as is contended by the plaintiff in error here, "that it is a presumption of law that when it is alleged in a complaint as in this case that the corporation is 'incorporated under and by virtue of the laws of the State of California,' that the corporation so mentioned is a corporation organized for profit and that such an allegation is sufficient to declare that it is so organized." But the Court held that "the proposition thus asserted is not correct for it may happen that as a matter of fact a corporation incorporated under the laws of this state to operate an irrigating canal is not one designed for profit."

It follows, therefore, that under the laws of California corporations can be formed for the sole purpose of supplying water to certain lands; that they are not corporations for profit and that the water right represented by stock in such corporations is "a perpetual easement to the land." And the stock which plaintiff was ready and willing to deliver was stock which did give water rights and was not ordinary stock—was attached to particular lands and could not be separately transferred or assigned.

But assuming, for the purpose of argument only, that the stock shown on the trial to belong to the plaintiff, and which it asserts its readiness and willingness to transfer to defendant, does not upon a strict literal construction give an absolute water right. It was the stock which both the parties had in their minds when the contract was signed.

The only complaint which defendant could make concerning it would be that the plaintiff falsely represented the actual amount of water which the stock purported to give, that is, that the representation of the quantity of water in the stock certificate was not true, and the irrigation companies could not, in fact, supply that amount of water under the stock. But defendant made no such defense, although expressly asked by the Court if he intended so to do (Record p. 168, f. 307).

"The Court (to defendant's counsel): Is your position here that under this form of organization it is impossible for this company to perform that contract (referring to stipulation in the contract for the delivery of shares of stock representing so much water)?

"Mr. Hanchett: Yes.

"The Court: Or that as a matter of fact there was not four inches of water there?

"Mr. Hanchett: No; but there is no provision by which the stock of the company represents water.

"The Court: That under the organization and law, the shares of stock cannot represent water?

"Mr. Hanchett: Yes.

"The Court (to plaintiff's counsel): Do you propose to show as a matter of fact that that quantity of water was attached to the land by that purchase?

"Mr. Duffield: Yes, your Honor, if it should become necessary I will show that more than that amount of water was attached."

But the offer of plaintiff's counsel to prove the quantity of water attached to the land was objected to by defendant's counsel as immaterial and was withdrawn.

The case of

Southern Development Co. vs. Silva, 125 U. S., 247.

is in point and is conclusive against the claim of the

defendant for any relief on account of these representations.

"Misrepresentations, to constitute sufficient grounds for setting aside a purchase, must be material, as being of such a nature as, if true, to add to the value; must not be evidently merely conjectural statements, and must be made without a belief in their truth, or without reasonable grounds for such a belief."

"Where advertisements for the sale of shares in a mine had been issued containing unfounded statements, but the purchaser had not relied upon them and had had opportunities of judging of their accuracy, held that he was not entitled by reason of them to have the contract rescinded."

The same rule is applied to misdescriptions when vendee has opportunity to examine for himself.

Gordon vs. Parmalee, 2 Allen, 212.
Mooney vs. Miller, 102 Mass., 217.

An action cannot be maintained by a purchaser against a vendor to recover damages for fraud upon a sale of land, in making false representation as to one of the boundaries, if at the time of the purchase, the defendant had the means of ascertaining the true line, and neglected to inform himself.

Clark vs. Baird, 7 Barb., 64.

Again the defendant has not offered to rescind the contract, but he still continues in possession and exercises acts of ownership over the lands. He has not offered up his contracts to be cancelled, nor has he notified plaintiff that he claims nothing under them.

He cannot, therefore, defend against the action.

Jennings vs. Brangton, 5 De Gex, M. & G., 126.
and California cases cited above.

In suits to rescind contracts for fraud, particularly where the subject matter is of a variable nature, it is the duty of the plaintiff to put forward his complaint at the earliest period possible.

Cobb vs. Hatfield et al., 46 N. Y., 533.

Action for the recovery of $1,000 and interest paid by the plaintiffs upon the purchase of an oil property in Pennsylvania upon the ground that the purchase had been induced by false and fraudulent representations of the character, yield and value of the property. Court held: In order to rescind a contract on the ground of fraud, there must not only be a disaffirmance of it at the earliest practical moment after the discovery, but a return of all that has been received under it and a restoration of the other part to the condition in which he stood before the contract was made.

The taking of any benefit under the contract after knowledge of the fraud or changing the condition of the property which is the subject matter of the contract, is a ratification of it.

See also Guskenheimer vs. Angevine, 81 N. Y., 394.

Gould vs. Cayuga Bank, 86 N. Y., 75, holding same.

Stone vs. Peaks, 16 Vt., 213.

Assumpsit on note given on contract or bond for sale of land. Defendant showed fraud and misrepresentation and failure of consideration, in that the title had been represented perfect and in one Geo. Donsemen, and land free from incumbrance, whereas title was not perfect, and was not in Geo. Donsemen and land was heavily incumbered, defendants brought several suits to clear and perfect their title.

Held that in an action upon a note where there has not been an entire failure of consideration, and no offer

has been made on the part of defendant to rescind the contract, he cannot set up as a defense that there was fraud in the contract on which the note was given, especially when the damages were unliquidated.

If the defendant would rely upon proving fraud as a defense to an action upon a note where there has been only a partial failure of consideration, he should, in the first place offer to rescind the contract, so as to place the parties in *statu quo*, if he has it in his power to do so.

Rescission will not be allowed, in law or equity, either as a defense, or in an action by the one alleging the fraud and misrepresentation, if the party seeking it, after discovery of the fraud, etc., delays taking steps to rescind or recover for the deceit.

Negley vs. Lindsay, 67 P. St., 217.
Akerley vs. Pilas, 21 Wis., 88.
Grymes vs. Sanders, 93 U. S., 55.

And see also

Bartlet vs. Drake, 100 Mass., 174.
Fitzpatrick vs. Flannegan, 106 U. S., 648.
Cal. Steam Nav. Co. vs. Wright, 8 Cal., 585

Finally, in an action on a sealed instrument in a court of law failure of consideration for the purpose of avoiding the obligation is not admissible as between parties and privies to the deed, and more especially where there has been a part execution of the contract.

Hartblum vs. Day, 19 How., p. 211, see p. 222.

Approved in

George vs. Tate, 102 U. S., p. 564.

IV.

The copy of the patent which the Court excluded was not properly certified under the provisions of the act of Congress.

The act of Congress (U. S. Revised Statutes, § 906) requires the keeper of the records to be certified to attach his seal of office to his certificate.

The recorder of a county in California is by law required to have a seal.

Deering's Annotated Code and Statutes of California (Political), Vol. I., Section 1026.

1026. *Seals of executive officers:*

Sec. 1026. Except where otherwise specially provided by law the seal of office of the various executive officers are those in use by such officers at the time this Code takes effect; and each of such officers must at once file a description and impression of such seal in the office of the Secretary of State.

Statutes of California, 1850, Chapter 58, p. 151: "An Act establishing the Recorder's offices in each county of the State, and defining the duties of the Recorder."

Section 8. "The Recorder shall provide an official seal, to be kept in his office and to be used by him in his official capacity. He may however, use his private seal until an official seal can be procured."

Statutes of California, 1861, p. 105, Section 6 of Chapter 122, prescribing the fees to be charged by County Recorders, contained the following provisions:

"Fees of County Recorder":

"For every certificate or attestation under seal, fifty "cents."

Statutes of California 1862, p. 279, Chapter 258, Section 6:

"Fees of County Recorder":

"For every certificate or attestation under seal, seventy-"five cents."

Statutes of California, 1869, p. 251, Chapter 179, Section 4:

"Fees of County Recorder":

"For every certificate under seal, fifty cents."

Deering's Annotated Code of California, Vol. 4, p. 503:

"Fees of County Recorder":

"For every certificate under seal, forty cents * * * for "taking and writing acknowledgments, including seal for "the first signature, fifty cents; for each additional name "twenty-five cents."

The certificate attached to the patent, states that the recorder has an official seal.

An official seal is by express statute in California required to be "a stamp or impression made by a public officer with an instrument provided by law to attest the execution of an official or public document upon the paper or upon any substance attached to the paper which is capable of receiving a visible impression."

Deering's Annotated Code and Statutes of California, vol. 3, sec. 1931.

1931. *Public and Private Seals; how made—Scroll or sign.*

Sec. 1931. A public seal in this state is a stamp or impression made by a public officer with an instrument provided by law to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper which is capable of receiving a visible impression. * * * The remainder of the section refers only to private seals and scrolls.

This was the meaning of a seal at common law. "The common law intended by a seal an impression upon wax or wafer, or some other tenacious substance capable of being impressed."

4 Kent. Com., 452.

The impression need not be upon a wafer or paper attached to the instrument.

Deering's Code, Vol. 2, Sec. 1628.

"1628. *Corporate Seal; how affixed:*

Sec. 1628. A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such written instrument is written."

The alleged certificate offered had merely a blank wafer with no impression thereon and no indication that any impression ever had been thereon. It was plainly without a seal and therefore inadmissible.

In overruling the motion for a new trial on this point, Mr. Justice Brewer said, "there was a wafer attached (to the certificate), but the defect was that there was no seal attached, nothing but a wafer without any impress. The law of California in respect to official seals provides for

an impression either upon the paper or the wafer attached. In some form or shape there must be an impression, and not the mere attaching of the wafer; and that being the law of California, the very language of the certificate shows that a seal was contemplated, because the Recorder certifies that he has attested it, with the seal of his office, and there is the wafer without the impression. So there can be no question but that the patent was properly rejected, and that there was no substantial injury therefrom is made clear from the fact that the trial judge said to the defendant's counsel at the time, that if he could show that the vendor had no title, that the verdict would be set aside; to that question the party did not seem to put an inquiry, resting it simply upon the technical question as to the admissibility of the form of the certificate."

Again the certificate to the official character of the person certifying the copy is not within the statute.

The act of Congress above quoted requires the certificate to be made by "the presiding justice of the court of the county, parish or district."

The certificate in question is not by any person describing himself in terms as such justice, but by one who states that he is "presiding judge of department number six, of the Supreme Court of Los Angeles."

The constitution of California provides for the election of one judge of a superior court in each county, excepting some counties where provision is made for more than one judge, and among them is Los Angeles County.

But no provision is anywhere made for any departments of such court or a presiding justice of any department or a presiding judge of the Supreme Court.

Paca vs. Dulton, 4 Mo., 372, holds that it must appear in the certificate of the justice that he is the *presiding judge.*

There are other errors assigned, but such of them as were relied upon in the court below have been covered by the discussion herein. There was no error on the trial, or in the record, and the judgment should be affirmed.

HENRY M. DUFFIELD,
Attorney for Defendant in Error.

DON M. DICKINSON,
Of Counsel.

Office Supreme Court U. S.
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JAN 5 1894
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Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 194.

HENRY M. LOUD, PLAINTIFF IN ERROR,

v.

THE POMONA LAND AND WATER COMPANY.

Brief of Plaintiff in Error in Reply to Brief of Defendant in Error just Filed.

GEORGE F. EDMUNDS,
BENTON HANCHETT,
Of Counsel for Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.

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Brief of Plaintiff in Error in Reply to Brief of Defendant in Error just Filed.

We feel bound to call the attention of the Court to some of the most important errors of statement in defendant's brief.

I.

The brief of defendant in error asserts (p. 2) that "Upon the execution of the contracts he (Loud) entered into possession of all the lands described therein, caused work to be done on them, laying out new streets, and grading and working existing streets, offered the lands for sale to the public, and exercised all usual acts of ownership over them."

Again, this brief says (p. 5): "He (Loud) admitted on the trial that he had executed all the contracts and applications (Record, p. 162, f. 297); that he had taken possession and exercised acts of ownership over the lands," &c. On p. 14, the brief says: "As it is uncontradicted that the defendant took possession of and enjoyed the use of the lands upon executing the contracts, and has never surrendered possession." These statements are erroneous and misleading.

The Record does not show that Mr. Loud entered into possession of all the lands. He did not admit it, and the evidence does not show any such facts.

The question of his possession was raised on the trial by the plaintiff below in *reference to the application to purchase lot* 11 *of the N.E. Pomona tract*, containing $40\frac{9}{10}$ acres, which is declared upon in the forty-ninth count, and is Exhibit 9, p. 189.

When this application was offered in evidence objection was made—"3d. That the contract described in the 49th count never had any force; that is, the first payment was not made. Plaintiff's counsel then stated that he expected to prove that the defendant took possession of the land *described in the forty-ninth count*, paid taxes thereon, laid out roads, and put up street signs and cleared the same" (p. 163).

The plaintiff then called John A. Woy as a witness, who testified that in 1887 he worked for Mr. Loud on lot eleven and adjoining lots, which lands Mr. Loud called Live Oak Park, and that what Mr. Loud called Live Oak Park consisted of lots 23, 24, 20, 19, 17, and 11, and that Mr. Loud laid out an avenue along the west line, north and south of lot 11, northeast Pomona tract, extending thence south between lots 16 and 17, 19 and 20, 23 and 24 (Record, pp. 163 and 164).

This is all of the evidence given by the plaintiff on the subject of possession. It is confined wholly to lot 11 of northeast Pomona tract, and the lots adjoining it, in what was called Live Oak Park.

On the defence, Mr. Loud testified (p. 176) that since the fall of 1888 he had done nothing whatever on lot 11, or the lots in that neighborhood known as Live Oak Park; that he had not been upon them, nor had anybody upon them, nor fenced them, nor worked them, and "that they are entirely vacant."

On cross-examination by plaintiff's counsel, his attention is called to lot 11. He says he authorized McComas to pay taxes on lot 11, which were paid in 1888; that the work which they did for him in part consisted in putting up signs upon the corners of streets, and names of streets; that there was no subdivision of lot 11; that Live Oak Park was a name applied to an indefinite section; "it is in the northeast Pomona tract;" that he "did not understand that any part of the lands which he bought constituted the whole of Live Oak Park;" that he put up a sign on lot 16; that "they worked on lot 11; lot 11 corners on lot 16. We did not subdivide any lots. I don't recollect that we laid out any new streets. I think I named Alexandrina avenue after consultation with several gentlemen owning lands there. The lots along which I had the streets turnpiked were lots 16, 23, 25, 28, 29, 30, 31, on the west of it in lots 6, 13, 15, 21, 22, 26, 27, 30, and 32. In the northeast Pomona tract lots 11 and 17 are east of lot 12, and Alexandrina avenue lies in west of lots 11 and 17. I made streets on all dividing lines between lots, and made a street between lots 11 and 17."

Plaintiff's counsel then asks the following question, and the record proceeds as follows (p. 177):

"How long were you in Pomona on a visit at the time when purchases were made? *I understand that the question is confined to lot* 11

"Objected to as not proper cross examination.

"A. I do not remember. I went there about midwinter and stayed until——

"Objection renewed.

"Defendant's counsel states: We don't deny but that Mr. Loud did take possession.

"The COURT. You only claim that he has done nothing there since the fall of 1888?

"Mr. HANCHETT. We don't deny that he went *on that lot*, commenced making improvements in the spring of 1887, but our testimony has been confined to showing that from the fall of 1888 he has done nothing there and has not been there.

"The COURT. I don't think the simple fact that he has done nothing since the fall of 1888 is sufficient to avoid the legal consequences, or that he did avoid them.

"Mr. DUFFIELD. I move to strike out the testimony.

"The COURT. If there is nothing more than that I will strike it out.

"Defendant excepted."

The testimony of Mr. Loud, both direct and cross-examination, we understand to be stricken out of the case on the motion of plaintiff's counsel, Mr. Duffield. If the cross-examination is in the case it shows that the whole inquiry is confined to lot 11 and the lots adjoining within the section known as Live Oak Park, and that it is all in the northeast Pomona tract.

The lands purchased under these twenty contracts and nine applications are situated in three separate, distinct tracts, viz., in the Pomona tract, and in the northeast Pomona tract, which tracts are in Los Angeles county, and in the San Antonio tract, which is in San Bernardino county. This appears from the descriptions in the contracts and applications.

The several descriptions, abbreviated, are as follows.

First. The descriptions in the twenty contracts taken from the first twenty counts are—

1. Lot 17, N.E. Pomona tract (p. 7).
2. Block 239, Pomona tract (p. 11).
3. Lot 19, N.E. Pomona tract (p. 14).
4. Lot 20, N.E. Pomona tract (p. 18).
5. N. ½ and S.E. ¼ of lot 23 N.E. Pomona tract (p. 21).
6. Lot 24, N.E. Pomona tract (p. 25).
7. Block 209 of Pomona tract (p. 28).
8. N. ½ of block 210, Pomona tract (p. 32).
9. S. ½ of block 210, Pomona tract (p. 35).
10. S.E. ¼ of block 211, Pomona tract (p. 39.)
11. Block 238, Pomona tract (p. 42).
12. 11½ acres, by description in N.W. corner of lot 34, San Antonio tract (p. 46).
13. 11⅛ acres, by description in N.E. corner of said lot 34 (p. 49).
14. 10 acres, by description in S.E. corner of said lot 34 (p. 53).
15. 10 acres, by description in S.W. corner of said lot 34 (p. 57).
16. N.E. ¼ of lot 43 of San Antonio tract (p. 60).
17. N.W. ¼ of lot 43 of San Antonio tract (p. 64),
18. S.E. ¼ of lot 43 of San Antonio tract (p. 67).
19. S.W. ¼ of lot 43 of San Antonio tract (p. 71).
20. Most easterly 20 acres of lot 36 of San Antonio tract (p. 74).

DESCRIPTION OF THE 9 APPLICATIONS.

41. Count, Ex. 1 (p. 183):
    N.E. ¼ lot 22, ten acres, San Antonio tract.
42. Count, Ex. 2 (pp. 183, 184):
    S.E. ¼ of lot 35, ten acres, San Antonio tract.

43. Count, Ex. 3 (p. 184):
S.W. ¼ of lot 22, 12½ acres, San Antonio tract.
44. Count, Ex. 4 (p. 185):
S.W. ¼ of lot 35, 10 acres, San Antonio tract.
45. Count, Ex. 5 (p. 186):
N.W. ¼ of lot 35, $12\frac{3}{10}$ acres, San Antonio tract.
46. Count, Ex. 6 (p. 187):
N.E. ¼ of lot 36, $12\frac{5}{10}$ acres, San Antonio tract.
47. Count, Ex. 7 (p. 188):
N.W. ¼ lot 22, $8\frac{7}{10}$ acres, San Antonio tract.
48. Count, Ex. 8 (pp. 188, 189):
S.E. ¼ of lot 22, 10 acres, San Antonio tract.
49. Count, Ex. 9 (p. 189):
Lot 11, containing $40\frac{9}{10}$ acres, according to map of N.E. Pomona tract.

These various parcels of land are not shown to adjoin lot 11 of the northeast Pomona tract. They appear by the descriptions themselves to be scattered and not adjoining; situated in different lots, in three several tracts, in different counties.

Reference to Exhibit 18 (p. 206, f. 377, 378) shows their situation.

The only lands of all these twenty-nine descriptions, situated in northeast Pomona tract, where lot 11 is situated, which are included in these purchases by Mr. Loud, are the following six parcels:

Lot 11, lots 17, 19, 20, N. ½ and S.E. ¼ of lot 23, and lot 24. These are included in 1st, 3d, 4th, 5th, 6th, and 49th counts. The other twenty-three descriptions are situated in the Pomona tract and in the San Antonio tract, and no claim was made by the plaintiff on the trial, as shown by the Record, that Mr. Loud ever took or had any possession of these descriptions of lands, and no evidence was offered to show such possession.

II.

The brief for defendant in error further says (p. 2): "Upon being called on for the payments he (Loud) refused to make them, alleging that he had not executed or authorized the execution of certain of the contracts; that he was induced to purchase the lands by misrepresentation and fraud; that the plaintiff had not title to the lands; that the stock in the irrigation companies, which the plaintiff offered in connection with the lands, was not the kind of stock which the contracts called for; that the plaintiff did not own or control sufficient water to irrigate the lands. The plaintiff below then sued upon the agreements," &c.

This statement of the brief is made as if it were intended as a statement of facts shown by the Record to have occurred before the suit was commenced. As such a statement, it is entirely unfounded. There is no evidence in the case at all showing that before this suit was commenced Mr. Loud was called upon for these payments, or refused to make them, or made any of these objections stated in the brief. There is no evidence given upon the subject.

III.

In respect of the law points of the brief of the defendant in error, we submit:

1. That so far as Loud had any possession of a few of the lots—all being separate in the contracts and far apart geographically—that possession was purely one as a tenant at sufferance, the contracts and applications for contracts declaring expressly that he was to have no legal or equita-

ble right whatever in respect of the lands until the whole affair should have been completed and he got his deeds.

2. He abandoned possession of the few lots he had ever taken long before suit.

3. The court below refused to admit evidence of the false representations of the plaintiff below as to the "represented" water rights (R., p. 175, f. 318), although it had already admitted evidence on the part of the plaintiff below intended to show what kind and extent of water was represented by the words in the contract (R., p. 169, f. 309). If oral evidence was to be admitted at all to explain the phrase, we humbly submit that it ought to have been admitted on both sides.

4. But the witness of the plaintiff below finally stated that what he meant was, "I said that hundred shares represented one [redacted] inches of water, because that is so understood was the intention of the company, and that is the best answer I can make." Whatever all his testimony amounted to was a question of fact for the jury and not of law for the court, and if a question of fact for the jury by the same rule the evidence offered by the defendant below to show what descriptions and representations were made to him of what this water right was must have been also admissible.

5. But the defendant below distinctly offered, among other defences, to make defence by proposing to introduce evidence to show that the plaintiff below misled and defrauded him in stating what the water rights were (R., p. 175, f. 318). The Court refused to permit such evidence to be introduced, and after that of course further proof on the same point was not offered, because it was found to be against the ruling of the Court. But the defendant below did offer a great number of deeds, executed by the plaintiff below, in a period immediately preceding this transaction, covering similar lands and conveying water rights, in order to show what the course of business had been and then was in respect of the definition and effect of the words used in these contracts, but the Court refused to admit even that sort of evidence (R., pp. 167, 173, and Exs. 19 and 20, pp. 206, 216).

Attention is called to the nature of this evidence found on pages 206, 214, and 216 of the Record, in the provisions of some of the deeds so offered, which show beyond dispute what was the sort of water right that the plaintiff was in the course of disposing of when these contracts were made. It is almost needless to say that the certificates of stock in the water company produced at the trial, as well as the articles of incorporation and by-laws of the water companies, do not provide for any such water right or any water right whatever, save such as may belong to a common stockholder in a universal water company who takes his stock without a penny of its amount having been paid in, subject to all the responsibilities of a stockholder and entitled to only so much water as he in common with all the other stockholders may get, subject to the sale of water rights by the land company, out of the plant of performance, and liable to all the expenses of maintenance. Such a stock certainly does not come within the description either literally, in substance or in justice, of what the defendant

below was to get under the description in the purchase contracts of "together with $406\frac{2}{10}$ shares of stock of the Del Monte Irrigation Company representing $4\frac{62}{100}$ inches of water under four-inch pressure, measured from centre of aperture." For it is manifest that neither the articles of incorporation nor the by-laws of that company or of either of the other water companies or their certificates of stock gave any such right. There is no provision in the articles of association of the irrigation company, or either of them, nor in their by-laws, that the ~~company~~ shareholders shall have water in any amount corresponding with the number of shares of the capital stock, or that it shall have any water at all. There is no evidence showing that the Del Monte Irrigation Company or Palomares Irrigation Company have any quantity of water.

7. If this question of ascertaining whether what the plaintiff said he was ready and willing to convey in respect of water was one open, then we submit the court below erred in holding, by its direction of a verdict for the plaintiff, that as a matter of law the plaintiff below was ready and willing to perform its part of the contract.

8. But if, as would seem to be the theory, the court proceeded upon the doctrine that the plaintiff either was under no obligation to have tendered performance on its part or to show that it was ready and willing to do what it had contracted to do, then we submit that the question is reduced to the simple point that the court below held in effect that the plaintiff there was under no obligation to make out its

case further than to prove the execution of the contracts and applications for purchase, and that the defendant had not paid the money. If this be sound law, which in the principal brief we have endeavored to show it is not, then the only redress for the defendant below is in equity.

9. In respect of the points made in the brief on the other side touching the order of the court below staying execution for thirty days, in order that the plaintiff below might deposit its deeds and transfers of stock for the information of the defendant, we have to say that, while it is true that the court had the power to stay execution, it is not true that it had the power to do anything for the relief of the defendant in case the deeds and transfers of stock should not conform to the contract. It could not reverse its judgment for any such reason, or take any other step as a court of equity might, in respect of enforcing the real rights of the parties on the whole transactions. We submit, therefore, that the order of stay and its provisions can have no effect either way upon the rights of the parties here. The court had on the trial refused to allow the defendant to give evidence tending to show that he had been misled and defrauded, or to give evidence to show what was meant by the ambiguous phrase respecting the nature of the water stock named in the contract, and having so done its stay of execution could work no security to the defendant, for it would have no power to do anything in respect of that very cause if the plaintiff had not deposited any deeds or transfers of stock. In all these general aspects of the case, then, the question recurs, whether the plaintiff was entitled to recover upon the mere proof of the execution of the agreements and the non-payment by the defendant, irrespective

the other side, we have already stated that the possession was never taken of the whole number of the separate and distinct lots mentioned in the separate and distinct agreements, and that in respect of the few that the plaintiff ever exercised any dominion over, he abandoned long before the commencement of this suit, and for reasons evidently well known to the defendant. So far, then, as possession may have any influence upon the judgment below, the judgment was clearly erroneous in giving to the plaintiff the whole amount of the whole purchase price in respect of all the lots, the greater part of which the defendant never had any possession of whatever; but, as we have before suggested, whatever possession there was was a possession merely at sufferance without any right even in equity, as expressly stipulated, and which therefore could be abandoned without any duty on the part of the defendant to make a formal surrender; for we take it to be clear that a tenant at sufferance may depart without ceremony.

In respect of the statements made in the third head of the brief on the other side, at page 36, that the lands to be by them supplied were stated in their articles of association, we have to say that such statements are entirely erroneous, for there is nothing in the articles of association or by-laws describing any such lands. One of the companies was organized to supply water within the area of the town of San José, the others were to supply water within the area of certain counties. There is nothing in the Record to show either that the Pomona Land and Water Company did convey to any of the irrigation companies the quantity of water necessary to supply the requisite amount to the lands in either district. The statement in the same brief, at page 37, that the Land and Water Company owned shares of stock in the irrigation companies calling for more than enough water to supply the lands sold to Mr. Loud for the

amount named in the contract is not true; there is no evidence tending to show any such fact, but it is clear from the articles of association, by-laws, and the statements in the certificates of stock that no such proposition could be true, for no share of stock called for any definite amount of water such as described in the contracts.

13. In respect of the statements in the brief on the other side, at page 46, that the plaintiff's counsel offer to prove the quantity of water attached to the land was objected to and withdrawn, is also incorrect. That statement is evidently based upon what took place at the trial as appearing in the Record at page 169, folio 308. The deed there mentioned was supposed to be a paper referred to in Exhibit 21, found in Record, p. 219, which paper was admitted in evidence, which recites that the plaintiff below had previously assigned to the Irrigation Company of Pomona 151 inches of water in the township of San José. But this did not cover anything in respect of the other irrigation companies whose stock it is alleged was to be taken by the defendant, and it did not show, as we have before remarked, any capacity in any of the companies to give to the plaintiff an absolute right to the specific amount of water that his contract called for.

14. We have in this brief in reply only thought it necessary to specially call the attention of the Court to the foregoing matters; there are many others that might be referred to as equally erroneous, but those we have mentioned are, we think, sufficient to point out to the Court the leading errors referred to.

15. It may be again stated, in a condensed way, that it appears from the articles of association of the three water companies and from their by-laws that at least one of them had put out a large number of shares, held by a savings bank under mortgage (R., p. 170), and that the plaintiff company was authorized to dispose of shares in the water companies without disposing of land, so as to demonstrate the fact that the shares proposed at the trial as being thus satisfying of plaintiff's rights were not shares that would entitle him to the amount of water named in the contracts, or give him any other paid-for benefit as of right in connection with his land purchased, to which the water was absolutely indispensable, than the right to be a common shareholder in these various water companies, and to take his fate of water or no water and assessment or no assessment upon his stock and liability for all the debts of the corporation. If these facts are material in this action at law, it is needless to observe that the defendant below has never been tendered what his contracts called for, and that the plaintiff is quite unable to perform the contract on its part.

It may also be proper to state again that it appears that none of these stocks in the water companies ever had a dollar paid in upon them, and that by the laws of California there could be no right to issue any stock at all without payment upon it, unless the by-laws provided for the issue before payment under conditions to be stated in the by-laws. These by-laws make no such provisions. And of course the policy of the California law, like that of all well-regulated States who wish to protect people against swindling, is that capital stock in corporations shall represent a capital paid in, and the people who contract to buy it are buying something more than a mere liability to pay debts.

GEORGE F. EDMUNDS,
BENTON HANCHETT,
Of Counsel for Plaintiff in Error.

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JAMES H. McKENNEY
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SUPREME COURT

OF THE UNITED STATES.

HENRY M. LOUD,
Plaintiff in Error,

vs.

THE POMONA LAND
AND WATER COMPANY,
Defendant in Error.

Brief in Behalf of Plaintiff in Error Upon Re-hearing.

BENTON HANCHETT,
Attorney for Plaintiff in Error.

GEO. F. EDMUNDS,
Of Counsel.

SEEMANN & PETERS, PRINTERS, SAGINAW, MICH.

SUPREME COURT

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vs.

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AND WATER COMPANY,
Defendant in Error.

Brief in Behalf of Plaintiff in Error Upon Re-hearing.

The suit is upon twenty contracts for the sale of lands which are situated a part in the County of Los Angeles and a part in the County of San Barnardino, in the State of California. Each contract is for the sale by the Pomona Land and Water Company to Henry M. Loud of a specific parcel of land, and a designated number of shares of stock in one of the three following irrigation companies, viz: The Irrigation Company of Pomona, the Del Monte Irrigation Company, and the Palomares Irrigation Company, which stock is described in the contract as representing water at the rate of

one inch of water for each one hundred shares of stock, under four-inch pressure, measured from center of aperture.

The contracts are severally set out in the first twenty counts of the declaration (R., p. 7 to 77), and are referred to in the statement of the evidence as correctly set out in these counts (R., p. 162).

The counts from number 21 to number 40 (R., pp. 77 to 118) are upon these contracts. The suit is also upon nine applications of Henry M. Loud to the Pomona Land and Water Company for purchase of lands, which applications are declared upon in counts 41 to 49, inclusive. (R., pp. 119 to 134.) These applications are exhibits numbers 1 to 9. (R., pp. 183 to 189.)

The remaining counts of the declaration, viz: counts 50 to 63, inclusive (R., pp. 134 to 139), were demurred to, and the demurrer was sustained. (R., pp. 153, 154, 155.)

The twenty contracts are in substance the same in form, the variance being in the dates, description of land, the amount of purchase price, the time of payment, the number of shares of stock in the irrigation companies, and the name of the irrigation company. The contracts bear date from March 30th, 1887, to April 25th, 1887, and the purchase price is made payable in three installments, one installment at the time of the execution of the contract, one installment in one year from date, and the last installment in two years from date of the contract, so that the latest installment of the purchase price of any of the contracts fell due April 25th, 1889.

The first installment on each of the contracts was paid. The suit is to recover the two last installments, and was begun by summons issued August 27th, 1889 (R., p. 4), over four months after the last installment upon any of the contracts had become due.

Each of the contracts presents the same points which are in contention in the case. The following is a copy of the contract contained in the first count, viz:

OFFICE OF THE POMONA LAND AND WATER COMPANY.

This agreement, made the eighth day of April, 1887, between Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, County of Los Angeles, State of California, party of the first part, and H. M. Loud, of Oscoda, Michigan, party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th, A. D. 1883, and in consideration of twenty-five hundred and thirty-nine dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments, and full performance of the covenants hereinafter expressed, to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale to the party of the second part, his heirs or assigns, the following described real property, situated in the County of Los Angeles, State of California, to-wit:

Lot seventeen (17) of the northeast Pomona tract, according to map of said tract, duly recorded in book 5, page 461 of miscellaneous records of Los Angeles County, California, estimated to contain forty and 62-100 acres of land, *together with 406.2 shares of stock of the Del Monte Irrigation Company, representing four and 62-1000 inches of water under four-inch pressure, measured from center of aperture*, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Del Monte Irrigation Company, *when payment in full is made for the above described land.*

The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace and control the same.

And for and in consideration of the foregoing agreement, and as the purchase price of the above described premises, the party of the second part do covenant and agree to pay to the party of the first part, its successors or assigns, the sum of ten thousand one hundred and fifty-five dollars, U. S. gold coin, to be paid in the following manner:

$2,539 on or before the delivery of this contract.
$3,808 on or before April 8th, 1888,
$3,808 on or before April 8th, 1889.
$—— on or before ————, 188–.

and interest upon said respective sums from April 8th, 1887, until paid, at the rate of eight per cent. per annum, payable annually; and if not so paid, at option of said company to be added to principal and bear like interest.

And the party of the second part in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy and enjoy the above described premises, does further covenant and agree to pay and discharge all taxes, assessments and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase money, the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from date of such payment at the rate of one per cent. per month.

And the party of second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due then it shall be lawful for the party of the first part, its successors or assigns, at their option to rescind this agreement to convey, to re-enter

upon and to repossess said premises and all improvements then existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto, *that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance or tender of all payments precedent thereto, the party of the second part, his heirs or assigns shall have no title, equitable or otherwise, to said premises.*

It is further expressly agreed that time is of the essense of this contract.

In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed, by its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this 3d day of May, 1887. Executed in duplicate.

POMONA LAND AND WATER COMPANY.

By H. A. PALMER, President.

(Seal of the Company)

By F. L. PALMER, Secretary.

H. M. LOUD. (L. S.)

Sealed and delivered in the presence of

B. F. NICHOLS.

The nine applications are substantially alike.

The eight first applications bear date April 15th, 1887. The ninth bears date April 8th, 1887. The provisions for payment of the purchase money are the same in each, and the same points in contention arise as to all of them, except in this respect, viz:—

The first payment provided to be made was paid upon all of them except upon the ninth application. Upon the ninth, which is an application for the purchase of lot eleven (11) of the northeast Pomona tract, only a part of the first payment was made. The last payment of the purchase price, by the terms of these applications, became due April 15th, 1889. The suit is to recover the balance unpaid upon all the applications. The following is a copy of one of the applications, being Exhibit 1. (p. 183.)

"APPLICATION FOR PURCHASE.

POMONA, Cal., April 15th, 1887.

Received from H. M. Loud seventy-five dollars deposit on application for purchase of northeast quarter (N. E. ¼) of lot twenty-two (22), containing ten (10) acres of land according to map of the San Antonio tract, duly recorded in Book 3, pp. 7, of map records of San Bernardino County, *with usual water rights pertaining to said tract*, at the price of fifteen hundred dollars and on the following terms: Seventy-five dollars cash deposit as above.

First payment $300.00 within 60 days from date; second payment, $562.50 on or before April 15th, 1888; third payment, $562.50 on or before April 15th, 1889; second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually.

In consideration of the premises, I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; *and in consideration that the Pomona Land and Water Company has withdrawn from the market the above described land for 60 days, so that the said H. M. Loud may purchase the same at the above agreed on price in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land*

and Water Company as the estimated damages suffered and the liquidated damages received by said company on account of the withdrawal of the land from the market as aforesaid.

Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

H. M. LOUD, (Seal.)
THOMAS & EASTON, (Seal.)
F. MACPHERSON, Agent.

Endorsed: Pomona, June 20th, 1887. Received $300.00, being balance of first payment on the within application. Pomona Land and Water Company, F. L. Palmer, Treas."

There is no averment in the declaration of any tender of a conveyance of the lands or of any tender of the stock in any of the irrigation companies, which the twenty contracts provide for, nor of any tender of any conveyance *or contracts* which the nine applications provide for.

The forty-ninth count is upon said exhibit nine, on which only a part of the first payment was made, and this count avers that Loud took possession of the land described in this application, viz., said lot eleven (11.) (R., p 133.)

The case of the plaintiff below was made by putting in evidence the contracts and applications, and giving evidence under the forty-ninth count that Mr. Loud took possession of the land described in that count. (R., pp. 162, 163, 164.)

When the plaintiff below rested, the defendant moved that the plaintiff be non-suited, because no tender of performance, nor ability to perform the contracts on its part had been

shown, which motion was denied and exception taken. (R., p. 164.)

The defendant below then put in evidence the articles of association of the Pomona Land and Water Company, and the articles of association and by-laws of the three irrigation companies, and gave evidence by Frank L. Palmer, a director and secretary and treasurer of the Pomona Land and Water Company, showing that no part of the capital stock of these irrigation companies had been paid in; that the Pomona Land and Water company was engaged in selling lands *with water rights*, from 1883 down to the spring of 1887; that lands required water, especially for fruit raising; that the customary amount of water *represented by a water right was an amount equal to a constant flow of one inch of water under four-inch pressure measured from the center of the aperture to the surface of the water, or what is known in California as a miner's inch, to each ten acres of land.* (R., pp. 164, 165, 166.)

The evidence of the defendant below also showed that the Pomona Land and Water Company sold *water rights* and water *was delivered on these rights* by the Irrigation Company of Pomona to parties who do not hold stock in that Irrigation Company, and that water rights were sold before the Irrigation Company of Pomona was formed, with a provision that they should be exchanged for water stock. *The water rights sold were for one inch of water for each ten acres of land.* (R., p. 172.) It appeared also by evidence given on the part of the Pomona Land and Water Company that in 1886 it authorized its agents, Thomas & Easton, for two years, to sell lands, together with an absolute water right, which was equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture, to each ten acres of land." (R., p. 171, Ex. 23 and Ex. C, part of Ex. 23, pp. 220,223.)

The lands were also sold with *water rights*, with the provision that the water rights should be exchanged for *water stock* in the Del Monte Irrigation Company. These sales were

made before the Del Monte Irrigation Company was formed. (R., p. 173.)

For the purpose of showing, among other things, what was understood to be the water rights and the water stock, and what the plaintiff below gave out to be understood as water rights and water stock, and which were covered by the terms of the contracts, the defendant below offered in evidence deeds made by the Pomona Land and Water Company to Charles W. Brown, and other parties, in all forty-one deeds, by their dates covering the period from September 5th, 1884, to December 14th, 1887, which offers were rejected and exception taken. The offers appear on pages 167, 173, 174. The deeds are exhibits 19 and 20. (R., pp. 206 to 218.)

Five of the deeds are set out and include deeds covering stock in irrigation companies *to be* formed, and also stock in the irrigation companies in question.

These deeds show a sale by the Pomona Land and Water Company of a distinct and definite amount of water described as "*an amount equal to a constant flow of one inch of water under four-inch pressure measured from center of aperture, to each ten acres of land*," which water right, by the terms of sale, is to be exchanged by the purchaser for water stock of a *corresponding value* in a water company to be organized and its stock to be issued on or before a specified date, or for water stock in one of the three irrigation companies in question.

The deed to Brown (p. 206) and the deed to Smith (p. 207) and the deed to Stewart (p. 210) provide that the water right is to be exchanged for water stock of *a corresponding value* in a water company to be organized.

By the deed to Hartwell, dated May 2nd, 1887, (p. 213) the same definite water right is sold with the provision that "said water right is to be exchanged by the purchaser for water stock of *a corresponding value* in the Del Monte Irrigation Company."

By the deed to Dodge, dated December 14th, 1887, (p. 215) the same definite water right is sold with the provision that said water right is to be exchanged by the purchaser for water stock of *a corresponding value* in the Palomares Irrigation Company.

The evidence of the defendant below showed that O. F. Giffin acted as agent in making sales for the Pomona Land and Water Company, who issued maps and circulars of which exhibit 18 is a copy (pp. 166, 167).

Mr. Loud negotiated his purchase with Mr. Giffin and received from him such map and circular (p. 174).

This circular says, among other things, "All water is conveyed to points of distribution in pipes (no open ditches) without loss from evaporation or seepage. *The perpetual right to use water for irrigation is sold with the land.* The abundant supply of water and the excellent distribution of the same, surpass any other settlement in Southern California, and experience of the past has demonstrated that without abundance of water for irrigation, the propagation of citrus fruits is a grand failure, the representation of other less favored localities notwithstanding."

Mr. Loud was asked by his counsel, "What representations were made by Mr. Giffin to you to induce you to make the purchase?" and stated that he proposed to show that Mr. Giffin stated to Mr. Loud, in substance, that the plaintiff sold the water with the land, and Mr. Loud *would get a good title to the water* as well as to the land, substantially what is stated in the circular, and Mr. Loud took these contracts relying on the fact that he would get such title as it was represented to him that he would get, and that the offer is to show the representations that were made to him that he would get the title to the amount of water specified; to show that the defendant was misled and defrauded.

The question and offer were objected to and the objection sustained and exception taken (p. 175).

Mr. Loud testified that he had no knowledge or information relating to the articles of incorporation of either of the irrigaiton companies, did not see them and knew nothing about them, had no knowledge whatever of the by-laws of either of the companies. This testimony was stricken out by the court on motion of the attorney for the plaintiff below, to which exception was taken (R., pp. 175, 176).

The evidence showed that the amount of the capital stock of the Irrigation Company of Pomona was $245,000, divided into 24,500 shares of the par value of $10 each (R., pp. 191, 192).

The capital stock of the Del Monte Irrigation Company was $400,000, divided into 40,000 shares, par value $10 each (R., pp. 193, 194), and the capital stock of the Palomares Irrigation Company was $200,000, divided into 20,000 shares, par value of $10 each (p. 195).

The plaintiff below showed that there had been issued 15,100 shares of stock in the Irrigation Company of Pomona, 21,000 shares in the Del Monte Irrigation Company, and 6,000 shares in the Palomares Irrigation Company (R., p. 169), and that in the Del Monte Irrigation Company 13,600 shares of stock were held by the San Francisco Savings Union as mortgagee of certain lands of the Pomona Land and Water Company (R., p. 170); that stock had been made out in the name of Mr. Loud in each of the irrigation companies, but never delivered to him (R., pp. 170, 171). Nothing else had been done with the stock made out to Mr. Loud except to make them out (R., p. 172).

There was no evidence given in the case showing *any quantity of water owned or possessed by any of the irrigation companies*, nor was there any evidence showing that 100 shares

of stock in either of the companies *in any way represented one inch of water*, except the following testimony:

The attorney for the Pomona Land and Water Company asked Frank L. Palmer, who was secretary and treasurer of that company, the following question:

"Q. How much water does a share of stock represent?"

Which was objected to as incompetent testimony, but was allowed and exception taken, and the witness answered, "100 shares of stock represents one inch of water, and that is true of each company." (R., p. 169.)

On examination by Mr. Loud's attorney, the witness testified as follows: "I said that 100 shares represented one inch of water because that is so understood was the intention of the company, and that is the best answer I can make." (R., p. 173.)

The attorney for the plaintiff in error offered in evidence a paper purporting to be a certified transcript of a patent from the United States to Henry Dallen, Ignacio Palomares and Ricardo Vegar of the San Jose ranch, which included the lands in question in the suit, dated January 20th, 1875, for the purpose of showing that the plaintiff had no title to the land.

It was objected to because the certificate of the recorder did not show an official seal. The Court sustained the objection, and exception was taken. (R., p. 174.) The paper offered is Exhibit 26. (R., pp. 230, 231.)

In answer to the evidence given by the plaintiff in error relating to Mr. Loud's possession of lot eleven (11), Mr. Loud testified that since the fall of 1888 he had done nothing on lot eleven (11), or the lots in that neighborhood, known as Live Oak Park; that he had not been upon them, nor had anybody been upon them, nor worked them, nor fenced them; and that they were entirely vacant, which testimony, on motion of the counsel for the defendant in error, was stricken out by the Court, and exception was taken. (R., pp. 176, 177.)

The errors assigned by the plaintiff are as follows, and are all relied upon:

"*First.* That the Court erred in admitting in evidence the contracts and applications sued upon.

Second. That the Court erred in admitting in evidence the contract described in the forty-ninth count of the declaration.

Third. That the Court erred in overruling the motion of defendant below, made at the close of the plaintiff's case, that a non-suit be entered against the plaintiff.

Fourth. That the Court erred in refusing to admit in evidence the several certified copies of deeds executed by the Pomona Land and Water Company to different parties conveying water rights in the Del Monte Irrigation Company, the Palomares Irrigation Company and the Irrigation Company of Pomona, offered by the defendant below, to show conveyances by the Pomona Land and Water Company of water rights in said irrigation companies.

Fifth. That the Court erred in refusing to admit in evidence the deed made by the Pomona Land and Water Company to Charles W. Brown, offered for the same purpose as said certified copies.

Sixth. That the Court erred in admitting in evidence the contract between the Pomona Land and Water Company and the Irrigation Company of Pomona.

Seventh. That the Court erred in permitting witness Palmer to answer the question, "How much water does a share of stock represent?"

Eighth. That the Court erred in admitting in evidence the shares of stock issued to defendant, Henry M. Loud, in the Irrigation Company of Pomona, the Palomares Irrigation Company, and the Del Monte Irrigation Company.

Ninth. That the Court erred in refusing to admit in evidence the deeds executed by the Pomona Land and Water Company to different parties re-offered by defendant to show the water rights which were conveyed by the Pomona Land and Water Company, and to supply which irrigation companies were formed.

Tenth. That the Court erred in not admitting in evidence the certified copy of the patent from the United States to Henry Dallen, Ignatio Palomares and Ricardo Vegar, and in ruling the same out of the case as evidence.

Eleventh. That the Court erred in refusing to permit the defendant, Henry M. Loud, to testify to the representations made to him by O. F. Giffin, to induce the defendant to make the purchases and accept the contracts sued upon.

Twelfth. That the Court erred in striking out the testimony of defendant, Henry M. Loud, that he had no knowledge of his own of the articles of association and by-laws of the Del Monte Irrigation Company, the Palomares Irrigation Company and the Irrigation Company of Pomona.

Thirteenth. That the Court erred in striking out the testimony of the defendant, Henry M. Loud, tending to show that he did no acts on lot eleven in the northeast Pomona tract since the fall of 1888, and that said lot had remained vacant and not in his possession since the fall of 1888.

Fourteenth. That the Court erred in refusing to charge the jury as requested in the first written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts declared upon in the 41st, 42d, 43d, 44th, 45th, 46th, 47th, 48th and 49th counts of the declaration, for the reason that there is no averment nor proof of any delivery or tender by the plaintiff to the defendant of an executed contract for the land described in the contracts declared upon. In order to entitle the plaintiff to recover, a contract executed by the plaintiff for a sale of the land and water rights described in said counts should have been delivered or tendered to the defendant by the plaintiff upon the payment by the defendant of the first payment provided for in the contracts sued upon, and the plaintiff should have avered in his declaration and proved such delivery or tender."

Fifteenth. That the Court erred in refusing to charge the jury as requested in the second written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in said counts, for the reason that such contracts are not proved. The contracts offered in evidence by the plaintiff under these counts are different from the contracts declared upon, for the reason that the contracts offered require that the plaintiff should deliver to the defendant contracts executed by the plaintiff for a sale of the land and water rights to the defendant when the defendant made the first payment

provided for in the contracts, while the contracts declared upon contain no such requirements."

Sixteenth. That the Court erred in refusing to charge the jury as requested in the third written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon said counts for the reason that the declaration does not aver and the evidence does not show any tender by the plaintiff to the defendant of a deed of the land and water rights described in the contracts."

Seventeenth. That the Court erred in refusing to charge the jury as requested in the fourth written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon said counts for the reason that the declaration does not aver what are the water rights pertaining to the lands described in the contracts and does not aver a tender of any contract or deed to the defendant for such water rights."

Eighteenth. That the Court erred in refusing to charge the jury as requested in the fifth written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover under said counts for the reason that the declaration does not aver that the plaintiff was the owner of the water rights described in the contracts referred to in said counts and an offer or tender to the defendant of a conveyance of the title to such water rights."

Nineteenth. That the Court erred in refusing to charge the jury as requested in the sixth written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in the 41st, 42d, 43d, 44th, 45th, 46th, 47th and 48th counts of the declaration, because the declaration does not aver, and the evidence does not show that the plaintiff had a good title to the lands described in said contracts, and a tender of a conveyance of such title to the defendants at the time when the last payment upon such contracts became due by the terms of such contract, or at any subsequent time."

Twentieth. That the Court erred in refusing to charge as requested in the seventh written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in the first forty counts of the declaration, for the reason that the declaration does not aver and the evidence does not show that the plaintiff had a good title to the stock described in said contracts, and a tender of the conveyance of such title to the defendant at the time when the last payments upon such contracts became due by the terms of such contracts or at any subsequent time."

Twenty-first. That the Court erred in refusing to charge the jury as requested in the eighth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th and 31st counts of the declaration, for the reason that the declaration does not aver and the evidence does not show that the plaintiff had a good title to the lands described in said contracts, and a tender of the conveyance of such title to the defendant at the time when the last payments upon such contracts became due by the terms of such contracts or at any subsequent time."

Twenty-second. That the Court erred in refusing to charge the jury as requested in the ninth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contract described in the 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th and 40th counts of the declaration, for the reason that the declaration does not aver and the evidence does not show that the plaintiff had a good title to the lands described in said contracts, and a tender of a conveyance of such title to the defendant at the time when the last payment upon such contracts became due by the terms of such contracts, or at any subsequent time."

Twenty-third. That the Court erred in refusing to charge the jury as requested in the tenth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts declared upon in said first forty counts, because the declaration does not aver any tender by the plaintiff to the defendant of a deed of the lands and stocks described in said contracts at the time when the last payment became due on said contracts, and does not aver any reason why such tender was not made."

Twenty-fourth. That the Court erred in refusing to charge the jury as requested in the eleventh written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contract declared upon in the said first forty counts because the declaration does not aver any tender of a deed to the defendant by the plaintiff, of the lands and stock described in said contracts at any time, and does not aver any reason why such tender was not made."

Twenty-fifth. That the Court erred in refusing to charge the jury as requested in the twelfth written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts declared upon in the said first forty counts. The declaration does not aver, and the evidence does not show that the plaintiff tendered or offered the defendant the stock described in said contract at any time when the last payments on said contracts became due, and the declaration does not aver any reason why such tender was not made."

Twenty-sixth. That the Court erred in refusing to charge the jury as requested in the thirteenth written request of the defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in said first forty counts, for the reason that the declaration does not aver, and the evidence does not show any tender by the plaintiff to the defendant at any time of the stock described in said contracts."

Twenty-seventh. That the Court erred in refusing to charge the jury as requested in the fourteenth written request of defendant, Henry M. Loud, viz:

"The contracts declared upon in the 1st, 3d, 4th, 5th, 6th, 21st, 23d, 24th, 25th and 26th counts require the conveyance and delivery by the plaintiff to the defendant of stock in the Del Monte Irrigation Company, which stock represents water in the amount of one inch of water, under four-inch pressure, measured from the center of aperture, for each one hundred shares of stock, and in that proportion of water for the amount of stock specified in the contracts respectively, and this means that such stock shall convey a title to the defendant of such water. In order to recover, the plaintiff is required to aver in the declaration and prove that the stock in said contracts

does represent and convey title to such amount of water, and that the plaintiff tendered such stock to the defendant. Because the plaintiff has not made such averment and proof, it is not entitled to recover upon such contracts.

Twenty-eighth. The Court erred in refusing to charge the jury as requested in the fifteenth written request of defendfendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon said 1st, 2d, 3d, 4th, 5th, 6th, 21st, 23d, 24th, 25th and 26th counts, because the evidence in the case fails to show that the stock described in the contracts declared upon in said counts represents the water or the title to water, as required by the contracts."

Twenty-ninth. That the Court erred in refusing to charge the jury as requested in the sixteenth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts declared upon in said 1st, 3d, 4th, 5th, 6th, 21st, 23d, 24th, 25th and 26th counts, because the evidence shows that the plaintiff did not have title to such stock as is described in said contracts, viz: Stock which represents or constitutes a title to water at the rate of one inch under four-inch pressure, measured from center of aperture, and was therefore not in a position to perform the contracts on its part."

Thirtieth. That the Court erred in refusing to charge the jury as requested in the seventeenth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in said 1st, 3d, 4th, 5th, 6th, 21st, 23d, 24th, 25th and 26th counts because the plaintiff has not tendered to the defendant such stock as the contracts require."

Thirty-first. That the Court erred in refusing to charge the jury as requested in the eighteenth written request of defendant, Henry M. Loud, viz:

"The contract declared upon in said 2d, 7th, 8th, 9th, 10th, 11th, 22d, 27th, 28th, 29th, 30th and 31st counts require the conveyance and delivery by the plaintiff to the defendant of stock in the Irrigation Company of Pomona, which stock represents water in the amount of one inch of water under a four-inch pressure, measured from center of aperture, for each 100 shares of stock, and in that proportion of water for the amount of stock specified in the contracts respectively, and this means that such stock shall convey a title to the defendant of such water. In order to recover the plaintiff is required to aver in the declaration and prove that the stock specified in said contracts does represent and convey title to such amount of water, and that the plaintiff tendered such stock to the defendant. Because the plaintiff has not made such averment and proof, it is not entitled to recover on said contracts."

Thirty-second. That the Court erred in refusing to charge the jury as requested in the nineteenth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon said 2d, 7th, 8th, 9th, 10th, 11th, 22d, 27th, 28th, 29th, 30th and 31st counts, because the evidence in the case fails to show that the stocks described in the contracts declared upon in said counts represents water or the title to water, as required by the contracts."

Thirty-third. That the Court erred in refusing to charge the jury as requested in the twentieth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts

declared upon in said 2d, 7th, 8th, 9th, 10th, 11th, 22d, 27th, 28th, 29th, 30th and 31st counts, because the evidence shows that the plaintiff did not have title to such stock as is described in said contracts, viz: Stock which represents or constitutes a title to water at the rate of one inch of water under four-inch pressure, measured from center of aperture, and was therefore not in position to perform the contracts on its part."

Thirty-fourth. That the Court erred in refusing to charge the jury as requested in the twenty-first written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in said 2d, 7th, 8th, 9th, 10th, 11th, 22d, 27th, 28th, 29th, 30th and 31st counts, because the plaintiff has not tendered to the defendant such stock as the contracts require."

Thirty-fifth. That the Court erred in refusing to charge the jury as requested in the twenty-second written request of defendant, Henry M. Loud, viz:

"The contracts declared upon in said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32d, 33d, 34th, 35th, 36th, 37th, 38th, 39th and 40th counts require the conveyance and delivery by said plaintiff to the defendant of stock in the Palomares Irrigation Company, which stock represents water in the amount of one inch of water under four-inch pressure, measured from center of aperture, for each one hundred shares of stock, and in that proportion of water for the amount of stock specified in the contracts respectively, and this means that such stock shall convey a title to the defendant of such water. In order to recover, the plaintiff is required to aver in the declaration and prove that the stock specified in said contracts does represent and convey the title to such amount of water, and that the plaintiff tendered such stock to the defendant. Because the plaintiff has not made

such averment and proof it is not entitled to recover upon said contracts."

Thirty-sixth. That the Court erred in refusing to charge the jury as requested in the twenty-third written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32d, 33d, 34th, 35th, 36th, 37th, 38th, 39th and 40th counts because the evidence in the case fails to show that the stock described in the contracts declared upon in said counts represents water or the title to water, as required by the contracts."

Thirty-seventh. That the Court erred in refusing to charge the jury as requested in the twenty-fourth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts declared upon in said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32d, 33d, 34th, 35th, 36th, 37th, 38th, 39th and 40th counts because the evidence shows that the plaintiff did not have title to such stock as described in said contracts, viz: stock which represents a title to water at the rate of one inch of water under four-inch pressure, measured from center of aperture, and was therefore not in position to perform the contracts on its part."

Thirty-eighth. That the Court erred in refusing to charge the jury as requested in the twenty-fifth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts described in said 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 32d, 33d, 34th, 35th, 36th, 37th, 38th, 39th and 40th counts because the plaintiff has not tendered to the defendant such stock as the contracts require."

Thirty-ninth. That the Court erred in refusing to charge the jury as requested in the twenty-sixth written request of defendant, Henry M. Loud, viz:

"The plaintiff is not entitled to recover upon the contracts declared upon in the 49th count for the reasons:

1st. The declaration avers that the defendant did not purchase the property and did not make the first payment, and the evidence shows that the first payment was not made, and therefore by the terms of the contract the plaintiff has no right to recover.

2d. Because the plaintiff does not aver and show a tender of a contract executed by the plaintiff to the defendant for the land."

Fortieth. That the Court erred in refusing to charge the jury as requested in the twenty-seventh written request of defendant Henry M. Loud, viz:

"Upon the whole evidence, the plaintiff is not entitled to recover in this suit."

Forty-first. That the Court erred in directing the jury to render a verdict for plaintiff, the Pomona Land & Water Company, as follows:

"Gentlemen of the jury: I think there are no questions of fact to be submitted to you in this case. I shall therefore instruct you as a matter of law to return a verdict for the plaintiff for seventy-nine thousand, eight hundred nineteen and 30-100 dollars."

The Court directed a verdict for the plaintiff below for the full amount of the plaintiff's claim, seventy-nine thousand, eight hundred nineteen and 30-100 Dollars. (R. p. 182.)

All the evidence is returned. (R. p. 178.)

ARGUMENT.

I.

The twenty contracts set out in the first twenty counts.

1st. Each of these contracts provide as follows, that in consideration of the purchase price paid by the party of the second part, the party of the first part does agree that "after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain and sale to the party of the second part, the following described real property, * * * together with specified number shares of stock of the irrigation company of ——— representing (at the rate of one inch of water for 100 shares of stock) under four inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of said company, *when payment in full is made for the above described lands.*"

The contract further provides as follows: "And it is hereby expressly covenanted and agreed between the parties hereto, that this instrument is not and shall not be construed as a conveyance, *equitable* or *otherwise* and that until the delivery of said final deed of conveyance or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, *shall have no title, equitable* or *otherwise, to said premises.* It is further expressly agreed *that time is of the essence of this contract.*"

The only undertakings on the part of the defendant affecting the conveyance to be made by the plaintiff are the covenants to pay the purchase price.

From these terms it appears that the Pomona Land & Water Company is to do two acts, viz: Convey by deed both the land and the shares of stock in the Irrigation Company, and second, *to delivver* to Mr. Loud the stock. The terms of the contract are that the Pomona Land & Water Company will, after the making of the payment, convey by deed the land and the stock and will deliver the stock "*when* payment is made in full for the land."

It is a further express provision that until delivery of the the deed or tender of all payments, the purchaser shall have no title, equitable or otherwise, to the premises, and that time is of the essence of the contract.

We contend that the intent of the contracts is that *upon* payments being made, and *when* they are made, the conveyance of the land and delivery of the stock will be made. The acts of payment and of conveyance and delivery of the stock are to be concurrent; the undertakings are dependent. The provision that the stock shall be delivered and accepted when payment in full is made for the land is decisive as to the time when the conveyance of land and the stock are to be made by the vendor. They are not to be made at some indefinite time, or some reasonable time after payment, but they are to be delivered *when payment is made.*

Under these provisions, in order for the plaintiff below to recover, in an action at law, the purchase money, after the last payment became due, the plaintiff must aver and prove that on the date when the last payment became due, the plaintiff tendered to the defendant a conveyance of the land and shares of stock, and tendered the stock itself.

Bank of Columbia vs. Hagner, 1 Pet., 455.
7 Curtis, 661, 664 to 667.
Washington vs. Ogden, 1 Black, 450, at 455, 456, 458.
Hill vs. Grigsby, 35 Cal., 656, 657, 658, 661 to 663.
Bohall vs. Diller, 41 Cal., 532 at 534, 535.

Englander vs. Rogers, 41 Cal., 422.
Heim vs. Treadwell, 72 Cal., 220.
Johnson vs. Wygant, 11 Wend., 49 at 51.
Parker vs. Parmelee, 20 John., 129 at 130, 134.
Kane vs. Hood, 13 Pick., 281 at 283, 284.
Carman vs. Pultz, 21 N. Y., 547 at 549.
Berryhill vs. Byington, 10 Iowa, 223.
Nelson vs. Nelson, 75 Iowa (38 N. W., 134).
Goodwin vs. Morry, 111 Ind., 68 (12 N. E. R., 82).
Powell vs. Dayton S. & G. R. Co., 12 Pac. R., 666 (Oregon).
Ackley vs. Richman, 10 N. J. Law, 305.
Egbert vs. Chew, 14 N. J. Law, 447.
Steinn et al. vs. Roberts, 20 N. J. Law, 443.
Biddle vs Coryell, 18 N. J. Law, 377 Cont. payable in installments.
Headley vs. Shaw, 39 Ill., 354.
Eddy vs. Davis, 116 N. Y., 247 at 252, 253.
Beecher vs. Conradt, 13 N. Y., 108.

While there has been great diversity in the decisions of the Courts upon the question whether, in cases of land contracts, the undertaking of the vendor to convey and of the vendee to pay were dependent or independent covenants, this Court has laid down a rule which is simple, clear, and easy of application, in the case of Bank of Columbia vs. Hagner, 1 Peter, 455, 7 Curtis, 661. If it is adhered to by this Court it forbids the plaintiff's recovery.

The Court say (7 Curtis, p. 664), "in contracts of this description, the undertakings of the respective parties *are always considered dependent, unless a contrary intention clearly appears.* A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it.

Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered

independent or dependent: yet it is evident the inclination of the Courts has strongly favored the latter construction as being obviously the most just.

The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence, in such cases, if either a vendor or vendee wishes to compel the other to fulfill his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal."

After reviewing the authorities, the Court says, (p. 666): "From these authorities it may be laid down as a settled rule that, at law, to entitle the vendor to recover the purchase money he must aver in his declaration a performance of the contract on his part, or an offer to perform at the day specified for the performance. *And this averment must be sustained by proofs* unless a tender has been waived by the purchaser."

The same rule is distinctly applied in Washington vs. Ogden, 1 Black at 458.

In California, where the *lex loci* of these contracts is declared, the same rule is adopted, following the decision of this Court in Bank vs. Hagner.

In Hill vs. Grigsby, 35 Cal., 658, the instrument provided that the plaintiff should convey "*as soon as*" the purchase money is paid. The purchase money was payable in installments, and the suit was brought after the last installment became due. The defense was tnat no tender of conveyance had been made.

The Court say, (p. 662): "In a contract for the sale of real estate where the purchaser covenants to pay the purchase money and the vendor covenants to convey the premises *at the time of payment*, or *upon* the time of payment of the money, or *as soon as it is paid*—and they all mean the same thing—the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform on his part, and performance, or the offer to perform, on the one part is a condition precedent to the right to insist upon performance on the other part.

The Court then quotes the rule stated in Bank of Columbia vs. Hagner as above quoted, and the reasons given for the rule. The Court then adds as follows: "The authorities in support of these principles are very numerous, and there is a greater degree of uniformity among them than is usual on a question presented, as this has been, in so many different aspects."

In Bohall vs. Diller, 41 Cal., 532, suit was brought upon a land contract, and the complaint in the case stated that the plaintiff "upon the payment of the purchase money was to convey the premises" to the defendant. It further stated that the plaintiff put the defendant into possession of the premises *and that the defendant is now in possession.* (P. 534.)

The Court held (p. 535): "The complaint is not sufficient to sustain the judgment. It is not alleged in the complaint that the plaintiff has sustained damages, and therefore he is not entitled to a judgment for damages. He cannot recover the purchase money, for the agreement was that a conveyance should be executed upon the payment of the purchase money, *and as the last installment had become due before the action was commenced, it was necessary for him to tender a deed before suing for the purchase money.* The covenants in such case are concurrent. The plaintiff has not alleged a tender of a conveyance of the premises."

On the very recent case of Powell vs. Dayton in the Supreme Court of Oregon, 12 Pac. R., 665, the rule is quoted from Bank of Columbia vs. Hagner. The Court also adds that "In construing contracts it is a primary rule that the intention of the parties must control, and this equally applies when the inquiry is directed to ascertaining whether the covenants in a a contract are dependant or independent. It must be said, however, that *when the language of the contract will admit of it*, justice and general convenience incline to the construction of a simultaneous performance."

2 Bingham on Real Property, p. 729, states the doctrine in this language: "It is a rule uniformly concurred in by all modern cases, that when, by the terms of a contract, the stipulations of both parties are to be performed on the same day or at the same time, they are to be regarded as immediately dependent.

The application of that rule is to be carried out unless a different intention is expressed in the agreement, or fairly to be implied from its provisions. But the idea of deducing the intention of the parties to make covenants independent when their performance is appointed for the same time, *because one preposition may have been used instead of another*, in indicating the concurrence of the acts, is now abandoned by the Courts."

See also the cases in 116 N. Y. and 13 N. Y., cited above.

Reliance is placed by the plaintiff upon the use of the preposition "after" in the contract in stating the time when the deed of conveyance is to be made. But the use of one preposition instead of another is not to govern, as we have seen. If from the whole instrument it does not clearly appear that it was the intention of the parties that the covenants should *not* be dependant, they are to be held as dependent. In this case, taking all the provisions for conveyance into ac-

count, the intention is clear that the conveyances by the plaintiff, and the delivery of the stock, are to be made at the time of the payment of the last installment.

The contract is explicit in statement that the stock of the Irrigation Company is to be delivered to the defendant *when payment* in full is made for the above described land.

This is an instrument separate from the deed of the land; it is a title to the water right, and its delivery is made concurrent with payment, and the plaintiff cannot recover without the delivery or tender of the stock, whether the deed be tendered or not.

If the delivery of the deed is to be treated as an act separate from the delivery of the stock, then recovery cannot be had because of a failure to tender the stock. If the delivery of the deed and stock are to be made at the same time, then the time of delivery is made concurrent by the explicit language relating to the stock.

The only averment on this subject in the declaration is that the plaintiff has been at all times, and is now, ready and willing, upon making the payments, to convey by deed the property described, together with the shares of stock.

Within all the cases, this is not a sufficient averment to meet the requirements of the law. There are no proofs made in the case of any tender of any deed, or of any offer or tender of any stock. The last payment on the contract became due April 25th, 1889, and the suit was not begun until August 27th, 1889.

The question distinctly presented under these facts is of the necessity of the averment and proof on the part of the plaintiff of the tender of the conveyance of the land and of the stock, and of the delivery of the stock, at the time the last payment on the contract became due.

The Court, upon the trial, held such averment and proof unnecessary.

2nd. The answer of the defendant in error as presented in the brief of the defendant in error at the former hearing is, first, that Mr. Loud, upon the execution of the contracts entered into possession of all the lands, and second, that upon being called upon for these payments he refused to make them.

Page 2 of the brief of the defendant in error on the former hearing states as follows: "Upon the execution of the contracts he entered into possession of all the lands described therein, caused work to be done on them, laying out new streets and grading and working existing streets, offered the lands for sale to the public, and exercised all usual acts of ownership over them."

"He defaulted on the payments due in 1888, and also upon the final payments in 1889. Upon being called upon for these payments, he refused to make them. * * * The plaintiff below then sued upon the agreements which were embodied in 20 contracts and 9 applications."

The brief again says on page 5 that "he (Loud) admitted on the trial that he had executed all the contracts and applications (R., p. 162, F. 297); that he had taken possession and exercised acts of ownership over the lands," and again on page 14 the brief says, "as it is uncontradicted that the defendant took possession of and enjoyed the use of the lands upon executing the contracts, and has never surrendered possession."

These statements are erroneous and misleading. First, as to the statement that "upon being called on for the payments, he (Loud) refused to make them," it is entirely unfounded in the record. There is no evidence in the case at all showing

that *before* this suit was commenced, Mr. Loud was called upon for these payments, or refused to make them, or made any of the objections stated in the brief to them. There is no evidence given upon the subject at all. The manner in which the plaintiff's case was made below is shown on pages 162, 163 and 164 of the record.

Second, as to the claim that Mr. Loud took possession of all the lands, or that he admitted that he took such possession. The record does not show that Mr. Loud entered into possession of all the lands. He did not admit it, and the evidence does not show any such facts.

The question of his possession was raised on the trial by the plaintiff below in *reference to the application to purchase lot 11 of the N. E. Pomona tract*, containing 40.9 acres, which is declared upon in the forty-ninth count, and is exhibit 9, p. 189.

When this application was offered in evidence objection was made "That the contract described in the 49th count never had any force; that is, the first payment was not made. Plaintiff's counsel then stated that he expected to prove that the defendant took possession of the land *described in the forty-ninth count*, paid taxes thereon, laid out roads and put up street signs and cleared the same." (R., p. 163.)

The plaintiff then called John A. Woy as a witness, who testified that in 1887 he worked for Mr. Lord on lot 11 and adjoining lots, which lots Mr. Loud called *Live Oak Park*, and that what Mr. Loud called Live Oak Park consisted of lots 23, 24, 20, 19, 17 and 11, and that Mr. Loud laid out an avenue along the west line, north and south of lot 11, Northeast Pomona tract, extending thence south between lots 16 and 17, 19 and 20, 23 and 24 (R., pp. 163 and 164).

This is all of the evidence given by the plaintiff on the sub-

ject of possession. It is confined wholly to lot 11 of Northeast Pomona tract, and the lots adjoining it, in what was called Live Oak Park.

On the defense Mr. Loud testified (p. 176) that since the fall of 1888 he had done nothing whatever on lot 11, or the lots in that neighborhood known as Live Oak Park; that he had not been upon them, nor had anybody upon them, nor fenced them, nor worked them, and "that they are entirely vacant."

On cross-examination by plaintiff's counsel, his attention is is called to lot 11. He says he authorized Mr. McComas to pay taxes on lot 11, which were paid in 1888; that the work which they did for him in part consisted in putting up signs upon the corners of streets, and names of streets, that there was no sub-division of lot 11; that Live Oak Park was a name applied to an indefinite section; "*it is in the Northeast Pomona tract*;" that he "did not understand that any part of the lands which he bought constituted the whole of Live Oak Park;" that he put up a sign on lot 16; that "they worked on lot 11; lot 11 corners on lot 16. We did not subdivide any lots. I don't recollect that we laid out any new streets. I think I named Alexandria avenue after consultation with several gentlemen owning lands there. The lots along which I had the streets turnpiked were lots 16, 23, 25, 28, 29, 30, 31, on the west of it in lots 6, 13, 15, 21, 22, 26, 27, 30 and 32. In the Northeast Pomona tract lots 11 and 17 are east of lots 12 and Alexandria Avenue lies in west of lots 11 and 17. I made streets on all dividing lines between lots, and made a street between lots 11 and 17."

Plaintiff's counsel then asks the following question, and the record proceeds as follows (p. 177):

"How long were you in Pomona on a visit at the time when purchases were made? *I understand that the question is confined to lot 11.*

Objected to as not proper cross examination.

A. I do not remember. I went there about midwinter and stayed until—

Objection renewed.

Defendant's counsel states: We don't deny but that Mr. Loud did take possession.

The Court: You only claim that he has done nothing there since the fall of 1888?

Mr. Hanchett: We don't deny that he went *on that lot*, commenced making improvements in the spring of 1887, but our testimony has been confined to showing that from the fall of 1888 he has done nothing there and has not been there.

The Court: I don't think the simple fact that he has done nothing since the fall of 1888 is sufficient to avoid the legal consequences, or that he did avoid them.

Mr. Duffield: I move to strike out the testimony.

The Court: If there is nothing more than that I will strike it out.

Defendant excepted."

The testimony of Mr. Loud, both direct and cross-examination, *we understand to be stricken out of the case on the motion of plaintiff's counsel, Mr. Duffield.* If the cross-examination is in the case it shows that the whole inquiry is confined to *lot 11 and the lots adjoining within the section known as Live Oak Park*, and that it is all in the Northeast Pomona tract.

The lands purchased under these twenty contracts and nine applications are situated in three separate, distinct tracts, viz: in the Pomona tract, and in the Northeast Pomona tract, which tracts are in Los Angeles County, and in the San Antonio tract, which is in San Bernardino County.

This appears from the descriptions in the contracts and applications.

The several descriptions abbreviated, are as follows:

First. The descriptions in the twenty contracts taken from the first twenty counts are:

1. Lot 17, N. E. Pomona tract, (p. 7.)
2. Block 239, Pomona tract, (p. 11.)
3. Lot 19, N. E. Pomona tract, (p. 14.)
4. Lot 20, N. E. Pomona tract, (p. 18.)
5. N. ½ and S. E. ¼ of lot 23, N. E. Pomona tract, (p. 21.)
6. Lot 24, N. E. Pomona tract, (p. 25.)
7. Block 209 of Pomona tract, (p. 28.).
8. N. ½ of block 210, Pomona tract, (p. 32.)
9. S. ½ of block 210, Pomona tract, (p. 35.)
10. S. E. ¼ of block 211, Pomona tract, (p. 39.)
11. Block 238, Pomona tract, (p. 42.)
12. 11½ acres, by description in N. W. corner of lot 34, San Antonio tract, (p. 46.)
13. 11.8 acres, by description in N. E. corner of said lot 34, (p. 49.)
14. 10 acres, by description in S. E. corner of said lot 34, (p. 53.)
15. 10 acres by description in S. W. corner of said lot 34, (p. 57.)
16. N. E. ¼ of lot 43 of San Antonio tract, (p. 60.)
17. N.W. ¼ of lot 43 of San Antonio tract, (p. 64.)
18. S. E. ¼ of lot 43 of San Antonio tract, (p. 67.)
19. S. W. ¼ of lot 43 of San Antonio tract, (p. 71.)
20. Most easterly 20 acres of lot 36 of San Antonio tract, (p. 74.)

DESCRIPTION OF THE 9 APPLICATIONS.

41st count, Ex. 1, (p. 183):

N. E. ¼ lot 22, ten acres, San Antonio tract.

42d count, Ex. 2, (pp. 183, 184):

S. E. ¼ of lot 35, ten acres, San Antonio tract.

43d count, Ex. 3, (p. 184):

S. W. ¼ of lot 22, 12½ acres, San Antonio tract.

44th count, Ex. 4, (p. 185):

S. W. ¼ of lot 35, 10 acres, San Antonio tract.

45th count, Ex. 5, (p. 186):

N. W. ¼ of lot 35, 12 2-10 acres, San Antonio tract.

46th count, Ex. 6, (p. 187):

N. E. ¼ of lot 36, 12 5-16 acres, San Antonio tract.

47th count, Ex. 7, (p. 188):

N. W. ¼ of lot 22, 8 7-10 acres, San Antonio tract.

48th count, Ex. 8, (pp. 188, 189):

S. E. ¼ of lot 22, 10 acres, San Antonio tract.

49th count, Ex. 9, (p. 189):

Lot 11, containing 40 9-10 acres, according to map of N. E. Pomona tract.

These various parcels of land are not shown to adjoin lot 11 of the Northeast Pomona tract. *They appear by the descriptions themselves to be scattered and not adjoining; situated in different lots, in three several tracts, in different counties.*

Reference to Exhibit 18 (p. 206, f. 377, 378) shows their situation.

The only lands of all these twenty-nine descriptions, situated in North-east Pomona tract, where lot 11 is situated, which are included in these purchases by Mr. Loud, are the following six parcels:

Lot 11, lots 17, 19, 20, N. ½ and S. E. ¼ of lot 23 and lot 24. These are inluded in 1st, 3rd, 4th, 5th, 6th and 49th counts. The other twenty-three descriptions are situated in the Pomona tract, and in the San Antonio tract, and no claim was made by the plaintiff on the trial, as shown by the record, that Mr. Loud ever took or had any possession of these descriptions of lands, and no evidence was offered to show such possession.

Emphasis was put upon Mr. Loud's statement on p. 177 that "I made streets on all dividing lines between lots and made a street between lots 11 and 17." This has reference to Live Oak Park where lot 11 is situated, and has reference to the acts done on lot 11 and the adjoining lots.

Lot 22 is entirely isolated from all the other lots. Lots 34, 35, 36 and 43 are miles away from lot 11 and the lots adjoining it. These last five lots are tracts of forty acres each. There was no question raised about the possession of these lots at all. The inquiry was directed only as to said lot 11.

We say, then, whatever question may be involved in the case arising from the fact that Mr. Loud took possession, it is confined to lot 11 and the lots adjoining it in what is known as Live Oak Park, and has no application to the balance of the lands covered by the contracts and applications. The question of possession is, therefore, no answer to the position that a tender of conveyance for the other lots should have been made.

3d. The defendant in error on this question of possession referred to the case of Rohrer vs. Bila, 83 Cal., 51, and Gates vs. McLean, 70 Cal., 42, to the point that Mr. Loud having taken possession, an averment of a tender of conveyance and proof of such tender were unnecessary. The case does not have any application to the facts presented in this case of Mr. Loud, and it does not in any manner overrule the case of Bohall vs. Diller, 41 Cal., 532, above cited.

In Rohrer vs. Bila, action was brought for *specific performance* of a land contract. The remedy at law and in equity under the practice of California is obtainable in the suit brought. The defendants in the case had not paid the purchase money, but had tendered it and had demanded a deed of the plaintiff prior to the bringing of the suit. The plaintiff

had failed to execute a conveyance of the land at the time such demand was made, and the defendants set up the defense that they had been thereby damaged by a fall in the value of the land in the intervening time.

The plaintiff, however, did tender a deed before suit was brought. The defendants *remained in possession and asserted the right not only to retain and hold the possession*, but to recover from the plaintiff damages exceeding the amount of the purchase price which was agreed to be paid for the land.

After referring to the point made in the case that the defendant's tender and demand for a deed was made before the date when the plaintiff was required to make conveyance, the Court in deciding the case, say: (p. 275.) "But whether this be true or not, we deem it immaterial for us to determine, in view of the fact that defendants took possession of the land under the contract, *and continue to hold the same*, and refuse to pay the balance of the purchase price. A purchaser cannot remain in possession of lands under a contract, and at the same time refuse to pay the purchase price. If the title fails, or the vendor refuses to convey, an action on the covenants of his deed or contract will give him all the relief to which he is entitled; but to allow him *to hold possession*, and at the same time defend against an action for the purchase price, would enable him *to hold the land discharged of the obligation under which he acquired it*. The rejection of an offer to perform by one party to a contract excuses the other party from performance as a condition precedent. The latter cannot be held to be in default; but such rejection does not release him from his obligation to perform, *so long as he insists upon the enforcement of the agreement for his own benefit*. He cannot claim under the contract, and at the same time repudiate it. The law requires him to surrender the possession of the property, or prove an eviction therefrom, before permitting the defense of a failure of consideration, or a suit to recover the purchase price or damages."

It thus appears that in that case the defendants were not only holding the possession but were asserting a right to hold and continue that possession against the plaintiff, and a right also to have the title to the land conveyed to them, and to have damages against the plaintiff in their favor.

In the case of Gates vs. McLean, 70 Cal., 42, the purchaser was in the actual possession of the land, claiming the right to hold such possession under the contract. The Court, in deciding the case, says, "Here the defendant in possession *claims the right to retain his possession by virtue of the contract*, and yet refuses to pay the purchase price."

The vendor had rescinded the contract, demanded the possession and brought the suit, not for the purchase price, *but to recover possession.*

In the case before the Court, while Mr. Loud took possession of lot 11 and adjoining lots in 1887, his testimony shows that he had not been in possession since the fall of 1888, and that the premises were entirely vacant. (R., p. 176.)

While this testimony was stricken out by the Court (R., p. 177), the fact for the purpose of this case is to be taken as true. It is to be considered either that he did not hold possession after 1888, and is not asserting in any manner possession against the plaintiff, or else that the striking out of the testimony was erroneous, depriving the plaintiff in error of the right to avail himself in his defense of the fact that since the fall of 1888 he was not holding any possession, or asserting any rights to the possession of the lands.

II.

Each of the contracts provides that the plaintiff shall deliver stock in the Irrigation Company named in the contract, representing the amount of water at the rate of one inch for every one hundred shares of stock, measured from the center of aperture, *when payment is made in full for the land.*

This stock is the title to be given to the defendant of the water right which he purchases, and is as much required as a conveyance of the property purchased as the deed is required as a conveyance.

It is insisted that the plaintiff cannot recover on any of these contracts without averment and proof of the tender of *such* stock on the day when the last payment became due. The authorities above cited are to this point.

There is no averment whatever of a tender, or readiness to deliver the stock itself in either of the Irrigation Companies.

There is no proof of any tender or offer of such stock. (Pp. 170, 171, 172.)

The stock to be delivered to the defendant is a *particular stock described in the contract*, which stock *is to represent* a certain amount of water measured in a certain way.

It is contended that the declaration should aver *the ability of the plaintiff to deliver such stock*, as well as a tender of it, and that proofs should be made to sustain the averment in order to warrant a recovery.

The defendant is not bound to accept a defective title.

See particularly Washington vs. Ogden, 1 Black, 450, at 456, 458.
Bank of Columbia vs. Hagner, 1 Pet., 455.
Swan vs. Denry, 22 Pick., 485, at 488.
Courtwright vs. Deeds, 37 Ia., 508, at 513, 514.
Linton vs. Allen, 6 N. E. Rep., 596.
Brownell vs. Jackson, 9 N. Y., 435, at 539 to 546.
Eddy vs. Davis, 116 N. Y., 247, at 251.
James vs. Burchell, 82 N. Y., at 108.

In Washington vs. Ogden, the action was brought in debt to recover thirty-five thousand dollars claimed to be due on an agreement whereby Ogden, trustee of Chicago Land Company, agreed to sell Washington & Turner certain land described in the John S. Wright contract with the trustees of the Chicago Land Company, dated June 4th, 1855, for sixty-seven thousand, five hundred dollars, payable thirty-five thousand dollars in sixty days from date of contract and the balance in one, two and three years, in equal installments, with six per cent. interest, payable annually. Ogden agrees that "on payment of the said thirty-five thousand dollars within the next sixty days, he will make a deed to said Washington & Turner for said property, and take a bond and mortgage on the same for payment of the balance of thirty-two thousand five hundred dollars as above stated. This agreement is to be dependent on the surrender and cancelment of said contract with said Wright."

Mr. Justice Grier says: "It is evident that the covenants of this contract are not independent. They are concurrent or reciprocal, constituting mutual conditions to be performed at the same time. The vendor is not bound to convey, unless the money due on the first installment be paid; nor is the purchaser bound to pay unless the vendor can convey a good title, free of all incumbrance. The agreement shows that the vendor at that time was not able to give a satisfactory title, having a deed on record by which he had covenanted to convey the same land to another. It is therefore made a condition precedent by this agreement, that this previous contract should be surrendered and canceled. The declaration avers that such previous contract was surrendered and canceled in due time, and that the plaintiff has ever been ready and willing to receive the money at the time and place and *to deliver to defendant a deed of the property.*

But there is no averment in the declaration that the plaintiff had a good and sufficient title free from all incumbrances

which he was ready and willing to convey. It is true, the words of his covenant are "that he will make a deed" to his vendees on receipt of the first installment. But the meaning of these words in the contract requires *that the deed shall convey the land* and it is not sufficient to aver his readiness to perform, merely according to the letter of the contract. The performance must always be averred according to the intent of the parties. It is not sufficient to pursue the words, if the intent be not performed. The legal effect of a covenant to sell is, that the land shall be conveyed by a deed from one who has a good title, or full power to convey a good title. This defect in the declaration cannot be cured by the verdict, under a presumption that the facts necessary to support it have been proved before the jury because it appears by the record that no such proof was offered to aid the insufficient averments of the declaration. * * * To entitle the plaintiff below to recover in this suit, the declaration should have averred that such deeds of surrender and cancellation (of Wright contract) had been duly executed; that the plaintiff *had a perfect title*, free from all incumbrances and *was able*, as well as willing and ready to convey a good title to the plaintiff *on the day named in the agreement*."

Bigler vs. Morgan, 77 N. Y., 312, at 318, 319.
James vs. Burchell, 82 N. Y., at 113.
Eddy vs. Davis, 116 N. Y., at 251.

There was no tender or offer to deliver the stock proven. (See pp. 170, 171, 172.)

The only evidence given upon the subject was by Frank L. Palmer, Secretary and Treasurer of the Pomona Land and Water Company, who testified in answer to the counsel for the defendant in error that stock was issued in Mr. Loud's name. The attorney for the defendant in error stated that he did not contend that it was delivered to Mr. Loud; simply

issued in his name ready to be delivered to him. (R., p. 170.)

Palmer further testified in relation to the certificates of stock issued in Mr. Loud's name that "nothing else has been done in relation to the certificates except to make them out, and I here exhibit them as being in my possession as secretary of the plaintiff." (R., p. 172.)

III.

The evidence in the case in fact shows that the plaintiff *was not able* to convey and deliver such stock as the contracts required.

There were three irrigation companies, the Del Monte Irrigation Company, the Palomares Irrigation Company, and the Irrigation Company of Pomona.

The contracts declared upon in the 1st, 3d, 4th, 5th and 6th counts, required the delivery of stock in the Del Monte Irrigation Company.

The contracts declared upon in the 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th counts required the delivery of stock of the Palomares Irrigation Company.

The evidence shows, and was undisputed, that water for irrigating the lands sold is essential to the enjoyment and value of the land.

See Record pp. 165, 166 and 172.

Frank L. Palmer, a director and the secretary and treasurer of the Pomona Land and Water Cumpany, testified as follows: (R., pp. 165, 166.)

"The need for irrigating the land depends very much on the character of the soil. There are some lands that do not require any water at all. The great majority of our valley lands require water, and water is especially required for fruit raising. The plaintiff was engaged from 1883 down to the spring of 1887 in selling lands with water rights at Pomona. The customary amount of water represented by a water right was an amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of the aperture to the surface of the water, or what is known in California as a miner's inch, to each ten acres of land."

On page 172 he says: "In the summer time the lands need most irrigation. They begin in April and continue through July, to the 1st of July (August). As to the bulk of the lands they need more irrigation in June and July, I guess, than in the earlier and later months."

The circular, Exhibit 18, above referred to, which was put into Mr. Loud's hands when he was negotiating for the purchase, says: "Experience of the past has demonstrated that without abundance of water for irrigation the propagation of citrus fruits is a grand failure."

It is clear from the evidence, and from the contracts themselves, that the stock is sold as *the means of conveying with the land a right or title to water* to go with the land, to be used with the land.

While we contend that the plaintiff below should itself aver and show that the stock does in that sense represent water, that it conveys a right or title to so much water to the defendant, and there is no such averment or proof on the part of the plaintiff, the evidence does show, in fact, that in the case of the Palomares Irrigation Company and the Del Monte Irrigation Company particularly, *the stock does not in any sense rep-*

resent water. It does not convey any right or title to any amount of water whatever.

This appears as follows:

First. The articles of association of these two Irrigation Companies, viz: the Del Monte and Palomares Irrigation Companies, are alike in the statement of the purposes for which the corporation is formed. It is "to acquire water rights, flumes, ditches, aqueducts, reservoirs and other property that may be necessary or convenient for supplying the water to such person or persons, or their assigns, in the Township of San Jose, County of Los Angeles, State of California, to whom the *Pomona Land and Water Company has sold water rights*, or to whom it may hereafter sell *water rights*, or to whom it may transfer *water stock* of this corporation, *and to no other person or persons whatsoever*. Also to maintain, construct and repair all ditches, flumes, aqueducts and reservoirs that may be necessary to the delivery of water to the person or persons hereinbefore described." Each is formed for the term of fifty years and has five directors.

Record, pp. 193 and 195.

The amount of the capital stock of each company is as follows: In the Del Monte Irrigation Company, four hundred thousand dollars, divided into forty thousand shares of par value of ten dollars each.

Record, p. 194.

In the Palomares Irrigation Company, two hundred thousand dollars capital stock, divided into twenty thousand shares of par value of ten dollars each.

Record, p. 195.

In each company the amount of the capital stock subscribed

is stated to be five thousand dollars. It does not appear in any way by the articles of incorporation that this subscribed stock, or any part of it is paid.

This is the substance of the articles of association of each of the companies.

It does appear by the testimony of Frank L. Palmer that *no part* of the capital stock subscribed in either of the companies has been paid in. (R., p. 165.)

By this it appears also that the capital stock is like the capital stock of any corporation. It simply represents the property generally of the company.

It does not entitle the holder to have or control any water whatever.

The company is not formed for delivery of water *to stock holders*. They are expressly excluded from those to whom water shall be delivered by the company.

There is no provision for delivery of water to persons to whom the plaintiff below has sold or shall *sell capital stock*. The persons to whom water is to be delivered are confined and limited to such as the plaintiff has sold *water rights*, or to such as it shall sell *water rights*, or to such as it may transfer *water stock* of the company.

The date of the articles of association of these two companies is February 21st, 1887.

There is nothing said in the articles of association about any quantity of water, or that capital stock shall or does in any way represent water.

There is no provision requiring in any manner that the company shall acquire or have water to correspond with its capital stock.

There is no basis whatever upon wich it can be found that there is an intention in any way that 100 shares of capital

stock shall represent one inch of water or any quantity of water, while the evidence of Mr. Palmer, the Secretary of the Pomona Land and Water Company, distinctly shows, as above pointed out, that said company was engaged in selling distinct water rights which were the right to an amount of water "equal to a constant flow of one inch of water, under four-inch pressure, measured from center of aperture to the surface of the water, or what is known in California as a miner's inch, *to each ten acres of land.*" (R. p. 166.) And the evidence further shows that Thomas & Easton who where the agents of the Pomona Land and Water Company for the sales of its lands, under whom O. F. Giffin acted in negotiating the sale to Mr. Loud, were authorized by the form of contract prescribed for their use, to contract to sell with the land the following water right, "an amount equal to a constant flow of one inch of water, under four-inch pressure, measured from center of aperture, to each ten acres of land, and a proportionate amount for each fraction thereof," * * * "subject to reasonable deductions in times of scarcity, arising from causes beyond the control of the Pomona Land and Water Company." (See Exhibit C, page 223 annexed to Exhibit 23, page 220, which is the contract between the Pomona Land and Water Company and Thomas & Easton put in evidence by the Pomona Land and Water Company at page 171.)

Second. The by-laws of these irrigation companies.

There is nothing in any of the by-laws of either of these companies which provides that the stock shall represent water at the rate of one inch of water for one hundred shares of stock, or that the stock shall represent water at all.

There is no provision which makes *stock* a title to any water, or that gives *to the holder of stock* any right to water at all.

The only provision in regard to the right of stockholders is the right to vote upon the shares of stock, by person or proxy, a majority of the stock to constitute a quorum.

It is the duty of the Board of Directors to cause to be issued to the stockholders, in proportion to their several interest, certificates which are to be signed by the President and Secretary, and certificates "shall be of such form and device as the Board of Directors may direct" signed by the President and countersigned by the Secretary, "to express on its face its number, date of issuance, and the number of shares for which, and the person to whom it is issued."

See Article 3, sec. 1, 2, 3, 6.
Article 4, sec. 3.
Article 5, sec. 1, 2.
Article 7.
Record, pages 200, 203.

Article 9 provides that stock cannot be transferred except on the transfer of land on which the water represented by the stock is issued. *Provided*, that the corporation or its stockholders may transfer their stock *to the Pomona Land & Water Company*, or to *a trustee for that company without any transfer of land*, and the Pomona Land & Water Company, or its trustee, *may transfer any of the stock without any transfer of land.*

The by-laws of these two companies are duplicates and are dated April 13th, 1887.

These by-laws give no rights to the *stockholder* to demand or have any water.

The by-laws cannot control the provisions of the articles of incorporation as to the purposes of the company, and the arti-

cles of incorporation are distinct to the point that the business of the company is to furnish water to persons to whom the Pomona Land & Water Company has sold, or may sell, water rights, or to whom it may transfer water stock, *and to no other person whatsoever*.

Taking the articles of incorporation and the by-laws together, and there is no provision as to terms, price or conditions upon which water will be furnished, *nor as to quantities in which it will be furnished*.

of the irrigation companies

By the articles of incorporation, the Pomona Land & Water Company may sell the entire of the water to whom it pleases, *without reference to any lands or any stock*. By by-law 9 the said company may sell *the capital stock without reference to water*.

Third. The only provision which purports to connect the capital stock with water is by-law 9 (p. 202), which undertakes to limit the *transfer* of stock to the transfer of land, "on which the water represented by the stock is issued." *Provided*, that the company or stockholders may transfer their stock to the Pomona Land & Water Company, and it may transfer the stock without the transfer of land.

Under this by-law 9 all the stock may pass into the hands of the Pomona Land & Water Company, and be sold by it or disposed of by it separate from and independent of any water rights, and of any lands. It may hold it and may transfer it *as any ordinary investment stock*. The purchaser from the Pomona Land & Water Company in such case may take it as an investment stock.

The evidence shows that 13,600 shares of stock in the Del

Monte Irrigation Company are held as a mortgage security by the San Francisco Savings Union. (R., p. 170.)

It is plain that under this by-law the stock does not represent water. It is attempted to make it represent one thing in the hands of one holder, and a different thing in the hands of another holder, as to the right of transfer of the stock.

Fourth. This by-law 9, is void and without effect. It attempts to limit the right of the holder of the stock, unless the holder be the Pomona Land and Water Company, to transfer stock only when a transfer of land is made "on which the water represented by the stock is issued."

It is difficult to say what is intended by this provision of the by-law, but the attempted limitation of the rights of transfer is contrary to the express provision of the statute which makes the stock personal property, transferable by assignment, delivery, and entry on the books of the company.

2. Deering's Statutes of California, sec. 324.

This section provides that "whenever the capital stock of any corporation is divided into shares and certificates therefor are issued, such shares of stock are personal property, and may be transferred by endorsement, by the signature of the proprietor, or his attorney, or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or description of the shares and the date of transfer.

There is no authority in the Statutes of California to make by-laws which change these provisions.

See sections 301, 303, 354.

The right of transfer of capital stock in a corporation cannot be taken away, or limited by by-laws.

Cook on Stockholders, Sec. 408.
Anglo Cal. Bank vs. Grangers Bank, 63 Cal., 359 at 362 to 364.
Driscoll vs. West Bradley Mfg. Co, 59 N. Y., 96 at 103 to 107.
Bullard vs. Bank, 18 Wall., 589.
Bank vs. Lanier, 11 Wall., 369 at 376.
Kenebec, etc., R. Co. vs. Knedall, 31 Me., at 477.
Sargent vs. Franklin Ins. Co., 8 Pick., 90 at 95.
Taylor vs. Griswold, 14 N. J. Law, 222 at 227 to 230.
Farmers Bank vs. Wasson, 48 Iowa, 336 at 339, 340.
Pulford vs. Fire Department of Detroit, 31 Mich., 458 at 466.
Ang. & Ames on Corp., Sec. 164.
Morgan vs. Struthers, 131 U. S., at 252, 253.

This attempted limitation of the right to transfer being void, there is nothing which makes this stock different in its character from the capital stock of a gas company, a railroad company, or any other corporation, as representing property, or property rights. It does not and cannot represent any right to a specific amount of water, or any right to a quantity of water. Yet the plaintiff's contract is to deliver stock representing one inch of water for each one hundred shares of stock, measured from center of aperture.

Fifth. It is the settled law of the land that the capital stock of a corporation gives the holder "no legal title to the property of the corporation. It only represents the proportion to which the holder is entitled in the distribution of the profits of the business, and in the estate of the corporation on its final winding up."

Kohl vs. Lilienthal, 81 Cal., 378 at 385 386.
Farrington vs. Tennesee, 95 U. S., 686, 687.
Sanger vs. Upton, 91 U. S., 60, 61.
Van Allen vs. Assessors, 3 Wall, 598.
Pierce vs. Field, 102 Mass., 261.

Plimpton vs. Bigelow, 93 N. Y., 599.
Cook on Stockholders, Sec. 3, 5, 9, 10.

Sixth. In reference to the stock of these two companies the Del Monte Irrigation Company and the Palomares Irrigation Company, the evidence is distinct that only five thousand dollars is subscribed in each of the companies, and that no part of the subscribed stock has been paid, *and that no other stock has been paid.* This evidence is by F. L. Palmer, the secretary of the two companies, and is undisputed.

See Record, p. 165.

The evidence by the same witness shows that there has been issued by the Del Monte Irrigation Company, and delivered to the Pomona Land and Water Company, twenty-one thousand shares of stock, and in the Palomares Irrigation Company six thousand shares of stock.

See Record, pp. 169, 173.

Seventh. There is no evidence in the case showing any consideration for the issuing of this stock by these companies to the plaintiff, *and there is no evidence in the case of any ownership by these companies, or either of them, of any water or wells or sources of supply of water.*

1st. The only evidence remotely referring to this subject is the following: On page 166 Mr. Palmer, after testifying to the business in which the Pomona Land and Water Company was engaged from 1883 down to the spring of 1887 in selling lands with water rights says: "The plaintiff company delivered the water up to the time of the formation of the irrigation companies. It delivered water until February,

1887, and had wells, pipe lines, flumes and ditches for that purpose."

On page 168 he says, "In regard to the Irrigation Company of Pomona, I have a deed in my possession, in my custody, from the plaintiff to the Irrigation Company of Pomona."

Witness continues: "The paper now shown me is signed by myself as secretary of the Irrigation Company of Pomona and by H. A. Palmer, former president of the Company."

Paper referred to by witness is offered in evidence by plaintiff's attorney, and objected to as immaterial, objection was overruled and exception taken, and a copy of the paper referred to is attached, marked exhibit 21. (R., pp. 169, 219.)

Plaintiff's counsel offered in evidence the deed of one hundred and fifty-one inches of water referred to in the contract to which defendants objected as immaterial and the offer was withdrawn. (P. 169.)

Said exhibit 21 appears on page 219 and is a contract between the Irrigation Company of Pomona of the first part and the Pomona Land and Water Company of the second part, which states as follows, that "the said party of the first part, for and in consideration of the sum of five dollars lawful money, acknowledge, and for the further consideration that the party of the second part did, by deed dated July 27th, 1886, sell, assign and transfer to the party of the first part, 151 inches of water in the Township of San Jose, County of Los Angeles, State of California, agrees to have issued and transferred to F. L. Palmer, as trustee for the party of the second part, fourteen thousand six hundred shares of its capital stock (five hundred shares having already issued to the original incorporators for the purpose of incorporating), that the shares so issued and transferred may be again transferred

to such person or persons as may be entitled to the same on account of water rights sold by the party of the second part on account of sale hereafter to be made by said party."

It will be seen that this instrument is nothing but a transfer by the Irrigation Company of Pomona of shares of its capital stock to the Pomona Land and Water Company.

Mr. Palmer further testifies on page 171, "The Pomona Irrigation Company has developed more water since the date it issued the fifteen thousand one hundred shares. I have been to the cienegas of the Irrigation Company of Pomona, in the district known as the Palomares, and have been to the wells in that district. They are flowing artesian wells. There are nearly one hundred altogether. How many there are in the district I do not know. There are one hundred wells in the three systems. I know but little with reference to the system of irrigation. I am the office man and have charge of the office, but of course know more or less about the lands and those matters."

On page 166 referring to Exhibit 18, which is the circular and map, he says "that the papers of which the paper exhibited is a copy, were circulated not by the officers of the company but by Thomas & Easton who held a contract under which the lands were sold at that time, and their agent was O. F. Gitfin. I mean Thomas & Easton were selling lands for the plaintiff there in 1887."

On page 168 he says Thomas & Easton's authority was in writing. On page 171 the record says "plaintiff's attorney offers in evidence the contract between Thomas & Easton and the Pomona Land and Water Company, appointing them agents." The paper was received in evidence and a copy annexed marked Exhibit 23. The exhibit appears on page 220 to 229.

On page 172, Mr. Palmer says, "When I said the Irrigation

of Pomona
Company had developed more water, I meant that it had bored more wells. The Irrigation Company of Pomona has never itself bored any wells; the plaintiff bored the wells I referred to for the Irrigation Company under the contract; in fact the development of water by boring wells has never been done by the Irrigation Companies, but by the plaintiff under its contract. I meant the contract introduced in evidence here. The development has been continued ever since. There has been a certain amount of water developed which had been referred to, and I was asked whether there has been more developed since. I said yes.

I know that well boring is going on all the time by the plaintiff under the contract referred to. I do not know just how many are being bored. The well boring is carried on by the plaintiff. No wells have been bored by the Irrigation Company of Pomona. Quite a number have been bored by it through the plaintiff, but I do not know their location, and I don't know where nor exactly how many."

The contract put in evidence, exhibit 21, (p. 219) above quoted from, it will be seen, makes no provision for the boring of wells by the Pomona Land and Water Company for the Irrigation Company of Pomona, or either of the Irrigation Companies.

Said Exhibit 23 is an agreement made the 16th day of November, 1886 between the Pomona Land and Water Company and Thomas & Easton, by which the latter was authorized to make contracts for the sale of the Pomona Land and Water Company's lands upon commission. The form of the contract by which sales were to be made by them is made a part of the contract, as an Exhibit C attached to it, which appears on page 223. These features are to be particularly noticed relating to this contract.

First. By the form of the contract which Thomas & Easton are to execute to purchasers the following provision is made, viz: "Said land having the *following water right;* an amount *equal to a constant flow of one inch of water, under four-inch pressure, measured from center of aperture, to each ten acres of land,* and a proportionate amount for each faction thereof. Said water to be delivered from the aqueducts of the Company in heads of not less than twenty-five inches and within..... of said lands, and the amount to be subject to reasonable deductions in times of scarcity arising from causes beyond the control of the Ponoma Land and Water Company. * * *

Said water right shall be subject to an annual charge for repairs of pipes and ~~adequates~~ aqueducts and expense of distribution. Said water right is to be exchanged by the purchaser for water stock *of a corresponding value* in a water company to be organized and its stock to be issued on or before ....."

It will be seen that by this provision, the purchaser is to obtain *an absolute right to a fixed amount of water which shall be equal to a constant flow of water under four-inch pressure, measured from center of aperture, to each ten acres of land,* subject to reasonable deductions in times of scarcity arising from causes beyond the control of the Pomona Land and Water Company.

Second. While this contract authorized Thomas & Easton to sell the lands with the absolute water right above specified, the contract further provides (p. 222) as follows: "Nothing herein contained shall be construed in such manner as to *compel said party of the first part to develop water* at any specified rate, or any specified amount, or within any particular time.

Said question of development being left entirely to the discretion of said party of the first part."

This is the only other contract to which the witness re-

ferred in his testimony. There is not only no provision in this contract for the furnishing by the Pomona Land and Water Company to the Irrigation Companies, or either of them, any specified amount of water, but the contract by its very terms reserves to the Pomona Land and Water Company the right *not* to develop water at any rate, or in any amount, to satisfy the terms of the contracts which shall be made in its behalf by its agents, Thomas & Easton.

While it authorizes its agents to sell absolute water rights, it does not obligate itself to its agents to provide the water to correspond to the water rights sold.

2d. Mr. Palmer further testified, page 169, under objection and exception, that "one hundred shares of stock represents one inch of water, and that is true of each company."

On page 173 he says: "I said that one hundred shares represented one inch of water because that is so understood was the intention of the company, and that is the best answer I can make."

This is all the evidence given in the case on the subject, and we submit that it leaves the case without any evidence of any ownership by these irrigation companies, Pacific Pomona and Palmonica, or either of them, of any water, or wells, or sources of supply of water. Certainly the case does not contain any evidence by which it can be said that *one hundred shares of stock of these irrigation companies, or either one of them, represents in any sense one inch of water under four-inch pressure, measured from center of aperture, as described in the contract*, or measured in any other way.

3d. It is to be borne in mind in this connection that this witness, who is director, secretary and treasurer of the Pomona

Land and Water Company, testifies distinctly (p. 166) that the plaintiff was engaged from 1883 down to the spring of 1887 in selling lands *with water rights* at Pomona; that the customary amount of water represented by a water right was an amount equal to a constant flow of one inch water under four-inch pressure, measured from center of aperture to the surface of the water, or what is known in California as a miner's inch, *to each ten acres of land*, and that the contract made with Thomas & Easton for the sale of lands by them, as agents, provided for sale of just such absolute water right, which water right was to be exchanged for water stock of a *corresponding value* in an irrigation company to be formed.

4th. The brief of the defendant in error on the former hearing states, on page 36, as follows: "When the three irrigation companies were formed, *the lands to be by them supplied with water were stated in their several articles of association*. The Pomona Land and Water Company conveyed to them respectively, the quantity of water necessary to supply the requisite amount of water to the lands in their district."

This statement is a mistake in reference to the facts. The articles of association of the irrigation companies do not specify the lands to be by them supplied with water, nor specify any lands at all. The purposes of the irrigation company are stated to be to "acquire water, water rights, flumes, ditches, aqueducts, reservoirs and other property that may be necessary or convenient for the supplying of water to such person or persons, or their assigns, in the counties of Los Angeles and San Bernardino, in the state of California, to whom the Pomona Land & Water Company *have sold water rights*, or to whom it may hereafter *sell water rights*, or to whom it may transfer *water stock* of this corporation, *but to no other persons whatsoever*." (R., pp. 192, 193, 195).

Instead of the irrigation companies being formed to supply

certain lands with water, they are only formed to supply such persons with water as the Pomona Land and Water Company may sell *water rights* to, or transfer water stock of the Irrigation Company to.

Instead of the Pomona Land and Water Company having conveyed to the irrigation companies respectively the quantity of water necessary to supply the requisite amount of water to the lands in their district, as stated in that brief, there is no evidence of the conveyance of any water by the Pomona Land and Water Company to the irrigation companies; and much less can it be said that it conveyed a quantity of water necessary to supply the requisite amount of water to the lands in their district, being at the rate of one inch of water for each hundred shares of stock issued.

Under the evidence it seems very plain that the stock of these irrigation companies held by the Pomona Land and Water Company does not represent water, and that said Pomona Land and Water Company undertook by its contracts with Mr. Loud to sell and deliver to him stock in the irrigation companies which should be a title or right to water at the rate for each hundred shares of stock "of one inch of water under four-inch pressure, measured from center of aperture," and that it was not on its part able to fulfill the contracts.

The evidence shows the Del Monte Irrigation Company and the Palomares Irrigation Company to be without any property whatever, and without any resources or means to supply water, yet the Court directed a verdict for the recovery by the plaintiff of the balance due upon the purchase price upon these contracts, as well as upon all the other contracts sued upon.

5th. Upon the question of whether the stock of these Irrigation Companies represents water, the defendant in error

cites the cases of McFadden vs. The Board of Supervisors of Los Angeles, 74 Cal., 571, and Applegarth vs. McQuiddy, 77 Cal., 408.

It is submitted that these cases have no bearing upon the question presented.

The case of McFadden vs. County of Los Angeles, 74 Cal., 571, presents the case of a corporation formed for the purpose of supplying water to the owners or occupants of a limited district specified in the articles of incorporation. The by-laws provided for charging the stockholders such sums as would cover the expense of distribution, and the waters of the company, were acquired and held to be used on the lands of the stockholders, and no water was to be sold or used on lands not covered by the stock of the company, and water was to be used and sold to no one else but a stockholder.

In the case of that company there could be no separation of the water from the *lands of the stockholders of the company*.

The sole question in the case was whether the statute providing for the Board of Supervisors fixing the rates to be charged by corporations formed for irrigating purposes, applied to that company. It was held that the statute did not apply; that it was intended to apply to such companies as sold or rented water to the general public for profit.

In Applegarth vs. McQuidley, 77 Cal., 408, the only question was whether an allegation in a complaint that a corporation was incorporated "to construct a water ditch for irrigating purposes," was sufficient to show that it was a corporation organized for profit, the question being raised upon demurrer. The Court sustained the demurrer, holding that it would be legal for an "irrigating canal and ditch company to be incorporated to distribute water gratuitously."

It is not contended on the part of the defendant that an irrigation company cannot be formed for the exclusive purpose of furnishing water to its incorporators or stockholders, nor that the stock of such company may not be so created as to represent water.

What is claimed is that the evidence shows that the capital stock of the Del Monte and Palomares Irrigation Companies does not represent water at the rate of "one inch of water under four-inch pressure, measured from center of aperture," for each one hundred shares of stock, which is the kind of stock in said companies which the plaintiff agreed to sell and deliver to the defendant, nor does the stock represent any quantity of water whatever.

6th. These irrigation companies are mere creatures of the Pomona Land and Water Company, evidently created to relieve it from responsibility for furnishing water to correspond with the water rights which it has sold or which it sells.

By the record at page 165, the following facts appear:

The directors of the Pomona Land and Water Company are B. S. Nichols, President; H. A. Palmer, Vice-President; Frank L. Palmer, Secretary and Treasurer; H. J. Nichols and Frank Hinkley.

The directors of the Del Monte Irrigation Company are B. S. Nichols, President; H. A. Palmer, Vice-President; Frank L. Palmer, Secretary and Treasurer; H. J. Nichols and J. P. Storrs.

The directors of the Palomares Irrigation Company are B. S. Nichols, Vice-President; H. A. Palmer, President; Frank L. Palmer, Secretary and Treasurer; H. J. Nichols and J. P. Storrs.

The directors in the Irrigation Company of Pomona are B.

S. Nichols, President; H. A. Palmer, Vice-President; Frank L. Palmer, Secretary and Treasurer; H. J. Nichols and S. T. Alexander.

IV.

Under the evidence which has been above pointed out, that nothing has been paid upon the stock of the Irrigation Companies (See Record, p. 165), the Pomona Land and Water Company has no title to the capital stock in those companies, because of the provisions of the statutes of California.

First. The statute forbids the capital stock of any corporation to be issued, except for money paid, labor performed, or property received.

2 Deering's Stat. of Cal., 359.
Constitution of Cal., Art. 12, Sec. 1.

Sec. 359, 2 Deering's Statutes of California is as follows:

"Sec. 359. No corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock, or indebtedness shall be void."

Article 12, Sec. 1. of the Constitution of California is as follows:

"Sec. 1. Corporations may be formed under general laws, but shall not be created by special act. The laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time, or repealed."

Second. The stock can be issued only when full paid, or when the by-laws provide for issuing certificates prior to the full payment under such restrictions and for such purposes as the by-laws may provide.

2 Deering's Stat. of Cal., Sec. 323.

Sec. 323, 2 Deering's Statutes of California is as follows:

"Sec. 323. All corporations for profit must issue certificates for stock when fully paid up, signed by the president and secretary, and may provide in their by-laws for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide."

There is no provision in any of the by-laws for the issue of stock prior to full payment. The by-laws only have provisions for the issue of certificates, to be signed by the president and secretary.

See Record, pp. 196 to 206.

These are such provisions as are necessary for the issue of certificates which are full paid.

Under the statute, in order to authorize the issue before payment in full, the by-laws should expressly provide all the restrictions under which, and the purposes for which, certificates may be issued.

The necessity of the by-laws providing the restrictions under which, and the purposes for which certificates may be issued before full payment, is that the company and its creditors may be protected against stock going into hands against whom assessments cannot be made for the portions of the stock which are unpaid at the time of the issuing of the certificate.

Third. The stock is made by the statute assessable for its full amount, for expenses, for conducting the business, and for paying the debts of the corporation. It is not intended that this can be evaded or avoided.

2 Deering's Stat. of Cal., Secs. 331, 332.

Sec. 331, 2 Deering's Statutes of California provides as follows:

"Sec. 331. The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form and to the extent provided herein."

Sec. 332 provides as follows:

"Sec. 332. No one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation except in the cases in this section otherwise provided for, as follows:

1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount."

Fourth. A stockholder is always liable for the debts of the corporation to the amount unpaid on his stock.

Harmon vs. Page, 62 Cal., 448 at 457, 458.
Cook on Stockholders, Sec. 42 f, Sec. 46 b, Sec. 49 c, (1st. Ed.)

Fifth. The statute expressly forbids the dividing, withdrawing, or paying to stockholders any part of the capital stock, except on dissolution of the corporation.

2 Deering's Stat. of Cal., Sect. 309.

Sec. 309, 2 Deering's Statutes of California is as follows:

"Sec. 309. The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock, except as hereinafter specially provided. For a violation of the provisions of this section, the directors, under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen,) are in their individual and private capacity jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reducted, or debt contracted; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence."

This statute is held by the Supreme Court of California to forbid distributing the property of a company which forms and constitutes its capital.

Kohl vs. Lilienthal, 81 Cal., 385, 386.

Sixth. The stock is made expressly personal property and transferable as personal property, as above pointed out.

2 Deering's Stat. of Cal., Sec. 324.

Sec. 324, 2 Deering's Statutes of California is as follows:

"Sec. 324. Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsment by the signature of the proprietor, or his attorney, or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer."

Seventh. The companies are formed under the general statute.

2 Deering's Stat. of Cal., Sec. 285, 286, 289, 290.

These sections are as follows:

"Sec. 285. Private corporations may be formed by the voluntary association of any five or more persons, in the manner prescribed in this article. A majority of such persons must be residents of this state."

"Sec. 286. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves."

"Sec. 289. The instrument by which a private corporation is formed is called "articles of incorporation."

"Sec. 290. Articles of incorporation must be prepared, setting forth:

1. The name of the incorporation:

2. The purpose for which it is framed;

3. The place where its principal business is to be transacted;

4. The term for which it is to exist, not exceeding fifty years;

5. The number of its directors or trustees, which shall not be less than five nor more than eleven, and the names and residence of those who are appointed for the first year, provided that the corporate powers, business and property of corporations formed or to be formed for the purpose of erecting and managing halls and buildings for the meetings and accommodation of several lodges or societies of any benevolent or charitable order or organization, and in connection therewith the leasing of stores and offices in such building or buildings for other purposes, may be conducted, exercised and controlled by a board of not less than five nor more than fifty directors, to be chosen from among the stockholders of such corporation, or from among the members of such order or organization; and provided, also, that at any time during the existence of corporations for profit, other than those of the character last above hereinabove provided for, the number of the directors may be increased or diminished by a majority of the stockholders of the corporation to any number not exceeding eleven nor less than five, who must be members of the corporation, whereupon a certificate, stating the number of directors, must be filed, as provided for in section two hundred and ninety-six, for the filing of the original articles of incorporation;

6. The amount of its capital stock, and the number of shares into which it is divided;

7. If there is a capital stock, the amount actually subscribed, and by whom."

These provisions of law, taken together, make these two things clear: First, that it is not designed that stock shall be issued by the corporation in such manner that it may be passed into the hands of parties, before payment, against whom the unpaid portion cannot be assessed and collected for the purpose of paying the creditors of the companies; and, second, in order that this end may not be defeated, while certificates of stock may be issued before full payment, it shall be done only under such restrictions and for such purposes as shall not defeat the above object of the statute.

As the evidence here is undisputed that the stock in the hands of the plaintiff, held by it for the purpose of delivery to the defendant, is unpaid stock, it is clear that it has been issued contrary to the provisions of the statute, and that the plaintiff has no right to make such use of it. It would be in the hands of Mr. Loud unpaid stock on which he would be liable.

8th. The brief of defendant in error on the former hearing (pp. 39 to 45) contends that the stock of the Irrigation Companies is properly issued, notwithstanding it is wholly unpaid, because the contention is that they are not corporations organized for profit, but that they come under the provisions of Section 5 of "Act cited in note to this section (Sec. 286) provides for stockholders and members at large of the corporation," which section is quoted. (See the brief, page 39.)

This section 5 is a section of an act entitled "An Act to provide for the formation of chambers of commerce, boards

of trade, mechanic institutes and other kindred protective associations."

Said Section 5 is as follows:

"Sec. 5. Corporations formed under this act may have a capital stock and may issue certificates to represent shares of such capital stock; *provided* that the certificate directed in the second section of this act to be executed and filed shall contain a statement of the amount of such capital stock and the number of shares into which it is divided; *and provided, further*, that the rights and privileges to be accorded to stockholders, as distinct to those to be accorded to members at large of the corporation, and the obligations to be imposed upon stockholders in the same relation, shall be fixed and established in the by-laws of each of such corporations."

It will be seen that this act does not purport to include irrigation companies, and further that it provides for two classes of members of the corporation, viz: Members at large and stockholders, to whom are accorded rights and privileges as distinct from those accorded to members at large, which rights and privileges "shall be fixed and established in the by-laws of such corporation."

It is manifest that these irrigation companies do not come under the provisions of this statute.

They are not included in the scope of the act; they do not have two classes of members; and neither the articles of association or by-laws provide for any special rights or privileges to be accorded to stockholders not accorded to other members of the corporation.

The brief also quotes (p. 41) from 2 Deering's Statutes, Section 552 as follows:

"Sec. 552. Whenever any corporation organized under the laws of this State furnishes water to irrigate lands, *which said corporation has sold*, the right to the flow and use of said water, is and shall remain a perpetual easement *to the land so sold*, at such rates and terms as may be established by said corporation in pursuance of law, and whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those *who have purchased their land of the corporation*."

The irrigation companies in question are not organized under this statute.

They are not organized to furnish water "to irrigate lands *which said corporation has sold*" and they do not "furnish water to irrigate lands *which said corporation has sold*."

These irrigation companies have not sold and do not sell lands. They have no lands to sell. They are, by their articles of association organized "for supplying of water to such person or persons, or their assigns in the counties of Los Angeles and San Bernardino in the State of California, *to whom the Pomona Land and Water Company has sold water rights, or to whom it may hereafter sell water rights, or to whom it may transfer water stock of this corporation, but to no other person or persons whomsoever*."

To whom may the Pomona Land and Water Company sell water rights?

By its articles of association (p. 190) its purposes are expressed to be to acquire and sell real estate and to acquire water rights "and to hold, develop, distribute, lease, sell and convey water and water rights, and to manage the same, and for the purpose of collection and distribution of water for irri-

gation, *domestic, manufacturing and other kindred purposes* to acquire" dams, ditches, etc.

The Pomona Land and Water Company may sell water rights for domestic, manufacturing and other kindred purposes, in no way connected with irrigation, to the residents and manufacturers in the Village of Pomona and adjoining villages, and the irrigation companies are expressly organized to supply water for such water rights.

To insist that these irrigation companies come under said section 552 requires a disregard of the provisions of their articles of association, which are to be read together with the articles of association of the Pomona Land and Water Company.

V.

The brief of defendant in error on the former hearing (p. 38) contends that the stock in these irrigation companies "was precisely what the contracts called for, whether it gives legal title to the water or not," and that the words "representing so many inches of water under four-inch pressure, are words of description merely."

If the contracts called for stock which conveys the title or right to "one inch of water for each one hundred shares of stock, under four-inch pressure measured from center of aperture," then the Pomona Land and Water Company is not entitled to recover, for the stock of these irrigation companies does not convey such title or right.

The contention of the plaintiff in error is that the contracts do call for such stock which conveys such a right or title to

water, and that the stock of the irrigation companies do not comply with this requirement.

Whether the contracts called for such stock depends upon the intention of the contracts. To arrive at the intention of the contracts the Court may take into account the situation and conduct of the parties at the making of the contract.

The following facts bear upon this question of intention:

First. The lands are practically of little or no value without irrigation.

F. L. Palmer, pp. 165, 166.

The statement of the circular, Ex. 18, (p. 206) which was put into Mr. Loud's hands by O. F. Giffin, (p. 174).

Second. The Pomona Land and Water Company was organized to sell definite water rights.

Exhibit 11, (p. 190).

Third. It was actually engaged in selling water rights which were rights to a specific amount of water, and a water right was understood to be "an amount equal to a constant flow of one inch of water, under four inch pressure, measured from center of the aperture to the surface of the water, or what is known in California as a miner's inch, to each ten acres of land." Palmer, (pp. 166, 172).

Fourth. The said circular, Exhibit 18, put into Mr. Loud's hands states that "the perpetual right to use water for irrigation is sold with the land."

Fifth. By the first eight applications for purchase which are in question in this suit (being exhibits 1 to 8, pp. 183 to 188) the Pomona Land and Water Company undertakes to sell the land "with usual water rights pertaining to said tract."

The testimony of Frank L. Palmer shows what this water right undertaken to be sold in these applications is when he says: (p. 166) "the customary amount of water represented by a water right was an amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture to the surface of the water, or what is known in California as a miner's inch, to each ten acres of land."

It does not seem that it could be a matter of dispute that the Pomona Land and Water Company, by these applications, is bound to convey a water right which is a title to an amount of water described by Mr. Palmer, but if that is the intention of these applications, what reason is there for supposing that a different intention governs the contracts in question?

Sixth. The contract between the Pomona Land and Water Company and Thomas & Easton (ex. 23, p. 220) authorized them as its agents to make contracts of lands, with the following provision in the contract, viz: (pp. 223, 224) "Said land having the following water right: an amount equal to a constant flow of one inch of water under four-inch pressure, measured from center of aperture, to each ten acres of land, and a proportionate amount for each fraction thereof, said water to be delivered from the aqueducts of the company, under heads of not less than twenty-five inches, and within .....of said land, and the amount to be subject to reasonable deduction in times of scarcity arising from causes beyond the control of the Pomona Land and Water Company." * * * "Said water right is to be exchanged by the purchaser for water stock *of a corresponding value* in a water company to be organized, and its stock to be issued on or before...."

Mr. Loud's negotiations were with O. F. Giffin, who acted for Thomas & Easton in making the sale to Mr. Loud.

Loud, p. 174.

F. L. Palmer, pp. 166, 167.

This provision of the Thomas & Easton contract certainly is an agreement of the Pomona Land and Water Company to convey an absolute right or title to an amount of water "equal to a constant flow of one inch of water under four inch pressure, measured from center of aperture, to each ten acres of land," subject only to deduction in times of scarcity arising from causes beyond the control of the Pomona Land and Water Company. It also is as certainly an agreement that "said water right is to be exchanged by the purchaser for water stock *of a corresponding value* in a water company to be organized, and its stock to be issued."

The water stock here contemplated is certainly a stock which should convey an absolute right or title to the same amount of water, because it was to be "*of a corresponding value.*"

Seventh. Mr. Loud did not see and had no knowledge of the articles of association or by-laws of the Irrigation Companies.

Loud, p. 175.

Eighth. The plaintiff in error offered in evidence forty-one deeds, made by the Pomona Land and Water Company to different parties, showing its custom of selling and conveying water rights from September 5th, 1884, to December 14th, 1887, which latter date was after the sale to Mr. Loud, by which deeds it appears that the Pomona Land and Water Company contracted to sell a right to a definite amount of

water, viz: "An amount equal to a constant flow of one inch of water under four inch pressure, measured from center of aperture to each ten acres of land," which water right was to be exchanged for water stock "*of a corresponding value.*" In some of the sales the water stock was to be in a water company to be organized, (p. 206, 208, 211) and in some of the sales this water right was to be exchanged "for water stock *of a corresponding value* in the Del Monte Irrigation Company," (p. 213, 214) or in the Palomares Irrigation Company (p. 215, 216.)

The Pomona Land and Water Company executed the deeds upon these lands corresponding to the sales.

See Ex. 19 and 20, p. 206 to 218.

These deeds show that the contention is unfounded that the Pomona Land and Water Company could not be supposed to undertake to sell and convey rights to definite amounts of water, and they are important as bearing upon the construction to be put upon the contracts in question.

It is submitted that it was error to exclude the deeds from the evidence.

Pp. 167, 173.

They ought to be considered upon the question of the construction of the contracts.

It is submitted that it does appear that the intention of the contracts is an undertaking to convey stock, which stock shall be a right or title to the amount of water specified in the contracts, and that the stocks of these irrigation companies, which were the only stocks which the Ponoma Land and Water Company proposed to deliver, or has to deliver to Mr. Loud, do not comply with the contracts.

VI.

It was error to permit the question of the counsel of the defendant in error to Mr. Frank L. Palmer as follows: (p. 169):

"Q. How much water does a share of stock represent?"

And the answer given, viz:

"A. One hundred shares of stock represents one inch of water, and that is true of each company."

It is submitted that this testimony is incompetent. The quantity of water which a share of stock represents, or whether it represents water at all, is to be determined by the articles of association and by-laws of the irrigation companies, the amount of stock issued by the companies, and the quantity of water which the companies are shown to possess.

VII.

The brief of defendant in error on the former hearing, at p. 46, says, "and the offer of plaintiff's counsel to prove the quantity of water attached to the land was objected to by defendant's counsel as immaterial, and was withdrawn."

This statement of the brief is erroneous. There was no offer made on the part of the Pomona Land and Water Company to prove the quantity of water attached to the land. The part of the Record referred to in this statement of the brief of the defendant in error appears on pp. 168 and 169, by which it appears that the plaintiff offered in evidence said Exhibit 21 before referred to, viz: the contract by which the Irrigation Company of Pomona transfers to the Pomona Land and Water Company 14,600 shares of its capital stock. (P. 219.)

Then the Record says, "plaintiff's counsel also offered in evidence the deed of the one hundred and fifty-one inches of water referred to in the contract." That would be a deed of one hundred and fifty-one inches of water conveyed to the Irrigation Company of Pomona alone, which deed was objected to as immaterial by the defendant's counsel, and the offer of the deed by the counsel for the defendant in error was withdrawn. This offer included nothing whatever showing conveyances to the Del Monte Irrigation Company, or the Palomares Irrigation Company, nor was it connected with any offer to show that the Pomona Land and Water Company possessed such a quantity of water that its deed, which was offered, would have conveyed one hundred and fifty inches of water to the Irrigation Company of Pomona.

VIII.

The nine applications for purchase which are declared upon in counts forty-one to forty-nine inclusive of the delaration.

These applications are in the same general form which is as follows:

APPLICATION OF PURCHASE.

POMONA, CAL., April 15th, 1887.

Received from H. M. Loud, one hundred dollars deposit on application for purchase of northeast quarter (N. E. ¼) of Section 35, containing twelve and 6-10 acres of land, according to map of the San Antonio tract, duly recorded in book 3, p. 7 of maps, records of San Bernardino County, with usual

water rights pertaining to said tract at the price of two thousand and sixteen (2016) dollars, and on the following terms:

One hundred cash deposit as above:

First payment,	-	$404 within 60 days from date.
Second payment,	-	$756 on or before April 15th, 1888.
Third payment,	-	$756 on or before April 15th, 1889.

Second and third payments to bear interest from date at the rate of eight per cent. per annum, interest to be payable annually. In consideration of the premises, I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out. And in consideration that the Pomona Land and Water Company has withdrawn from the market the above described land for 60 days, so that the said H. M. Loud may purchase the same at the above agreed on price; in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages suffered, and the liquidated damages received by said company on account of the withdrawal of the land from market as aforesaid.

Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. *No title, legal or equitable, nor any right to the possession of the above described land shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract* to him for the same.

H. M. LOUD, [SEAL.]
THOMAS & EASTON, [SEAL.]
F. MACPHERSON,
Agent,

First. By the terms of the applications, there is no undertaking of the plaintiff expressed. It is, first, a receipt for the amount deposited, providing that a first payment shall be made within sixty days from the date of the instrument, and a second and third payment in one and two years after such date, the whole making up the price at which the land is to be sold, and the defendant agrees to purchase the property on those terms, and in consideration that the plaintiff withdraws from the market the land described for sixty days, so that the defendant may purchase the same at said price. In case he fails to make said first payment then the sum deposited is to be retained by the plaintiff as estimated damages. Time is declared to be of the essence of the fulfillment of the obligation by the defendant to purchase the land, then the instrument provides that "no title, legal or equitable, nor any right to the possession of the above described land shall inure to said H. M. Loud until the Pomona Land and Water Company *shall have delivered an executed contract* to him for the same."

The intent of this in strument is plain in these features, viz :

1st. The defendant is to have sixty days within which to elect to make the purchase, and he signifies his election to make it by paying the first payment provided for. If he does not pay that first payment the contract is at an end and the deposit is forfeited.

2d. If he does make that payment he thereby elects to make the purchase, *and he is then entitled to have executed and delivered to him a contract by plaintiff for the land.*

3d. It is made of the express terms of the instrument that this application for purchase itself, the payment of the deposit and the making of the first payment by which the election is signified, does not give any title, legal or equitable, nor any

right to the possession of the land. The intention is that he shall only have a right to have a contract. The contemplation is that his right shall be provided for by a contract executed by the plaintiff when said first payment is made by the defendant.

Eddy vs. Davis, 116 N. Y. at 253.

4th. It will be observed that this application is for the sale of the land "with usual water rights pertaining to said tract." The contract which is to be executed by the plaintiff on the defendant's making the first payment is intended to provide for the execution and delivery of a deed to the defendant at the proper time, and to define the water rights to be conveyed, also the right of the defendant to the possession of the land, for it clearly contemplates that defendant may have possession. This contract also is intended to provide for the rights and and remedies of the plaintiff as a vendor.

Second. The declaration alleges that the defendant refused to purchase, to-wit: Neglected and refused to pay the second and third payment.

It shows that the deposit and first payment were made. From this it appears, from the declaration itself, that the defendant was entitled to have, and that it was the duty of the plaintiff to deliver to him an executed contract for the lands.

We contend that in order to authorize a recovery by the plaintiff in this suit, which was brought after the last payment became due, it is necessary that the plaintiff should aver and prove the execution and tender of the contract to the defendant for the land, as contemplated in this application.

Unless and until that is done by the plaintiff, he has no right to the third and fourth payments.

There is no averment in the declaration on the subject, other than this, that the plaintiff "has been ready and willing at all times, and now is ready and willing, to sell unto the said defendant the premises described in the last mentioned agreement upon payment by him of such sum of money by him as aforesaid agreed to be paid therefor." No evidence was offered in the case of any execution or tender by the plaintiff of the contract to the defendant for the land.

We submit that under the authorities before cited the plaintiff is not entitled to recover upon these applications.

IX.

The forty-ninth count is upon an application to purchase lot eleven, according to the map of the Northeast Pomona tract, for ten thousand, two hundred, twenty-five dollars, on the terms of five hundred and ten dollars deposit, two thousand, forty-five dollars first payment in sixty days; three thousand, eight hundred, thirty-five dollars second payment, on April 8th, 1888; three thousand, eight hundred, thirty-five dollars third payment, on April 8th, 1889.

The declaration avers, page 133, that the defendant did not perform the agreement and did not purchase the property.

It avers that the defendant did not, within sixty days, pay the two thousand, forty-five dollars, and has not paid the same, but has only paid one thousand dollars thereon, and has refused to pay the plaintiff the two thousand, forty-five dollars of such payment.

It further avers that the defendant took possession of the land, and relying upon his performing the contract, the plain-

tiff suffered him to take possession and constructed a pipe line to the premises.

It avers the readiness of the plaintiff to sell the land to the defendant upon the payment by him of the sums of money by him agreed to be paid.

Record, pp. 132 and 133.

Like the other applications above referred to, the express condition of this instrument is that in case the defendant fails or refuses to make said first payment of two thousand forty-five dollars within the sixty days, the deposit of five hundred and ten dollars shall be retained by the plaintiff as stipulated damages.

The failure to make the first payment ends the right of action at law of the plaintiff. The contract does not give to the plaintiff a right of election in the matter at all; it leaves it for the defendant to make the first payment or not to make it as he may choose. If he does not make it, the contract ends. If he does make it, then he is holden for the last two payments.

The case is not in equity and the plaintiff's right to recover is upon the terms of the contract itself, and that the plaintiff became entitled to the money sued for by those terms. In fact the defendant made the first payment in part and not in full. It did not deprive him of his election not to purchase by a failure to pay the balance.

The payment of a part of the first payment and the taking possession of the land was not an election within the terms of the contract, and the plaintiff has no right under the contract to insist that it is an election. The possession was abandoned as we have before pointed out, and no claim was made under the contract by Mr. Loud after the fall of 1888.

We insist that whatever the plaintiff's remedy may be in equity, he has not the right to recover in this case the pur-

chase money. He has only the right to retain the deposit and so much of the first payment as has been paid to him. Without submitting any question of fact to the jury, the Court charged that the plaintiff was entitled to recover on these facts.

X.

For the purpose of showing that the plaintiff had not the title to the land in question lying within Los Angeles County, the defendant offered in evidence a certified transcript of the patent from the United States to Henry Dallen, Ignacio Palomares and Ricardo Vegar, of the San Jose Ranche. (p. 174).

The evidence shows that the lands in question under this contract, situated in Los Angeles County, are a part of this ranche.

Record (p. 168).

The transcript offered is a transcript from the Recorder of Los Angeles County, and the instrument was rejected by the Court for the reason that the seal of the Recorder, attached to his certificate, had no impression upon it.

The instrument is certified under Section 906 of the Revised Statutes of the United States, which provides that exemplifications shall be admitted "by the attestation of the keeper of the said record or books, and the seal of his office annexed, if there be a seal, together with the certificate of the presiding Justice of the Court, county, parish or district in which said office may be kept, that said attestation is in due form and by the proper officer."

The transcript has annexed to it the certificate of the County Recorder of Los Angeles County, which certificate is in the following form:

"STATE OF CALIFORNIA, } ss.
COUNTY OF LOS ANGELES. }

I hereby certify the foregoing to be a full, true and correct copy of the instrument appearing recorded in Book No. 2 of Patents, page 268, Records of Los Angeles County, and that I have carefully compared the same with the original record.

In witness whereof I have hereunto set my hand and affixed my official seal this 11th day of April, 1890.

[SEAL.] JOHN W. FRANCIS.
County Recorder."

Record, p. 230.

To the left of the name of John W. Francis appears a seal, circular in form, composed first of red paper affixed to the certificate, and upon such red paper a golden or bronze colored paper affixed as a postage stamp is affixed to an envelope with mucilage. There is no impression made in said two papers constituting the seal.

Annexed to the instrument and following the certificate of the Recorder are the following certificates, viz:

"STATE OF CALIFORNIA, } ss.
COUNTY OF LOS ANGELES. }

I, J. W. McKinley, do hereby certify that I am presiding Judge of Department No. 6 of the Superior Court of Los Angeles County, California, and do further certify that the attestation to each of the copies of instruments hereto annexed, the same being copies of deeds appearing upon the records of deeds of said county, in book 6, at page 434; in book 7, at page 619; in book 35, at page 635; in book 125, at page 21, and book 126, at page 82, respectively, and copy of patent appearing upon the records of

patents of said county, in book 2, at page 268, is in due form and made by the proper officer, and that each of the instruments of which the annexed purport to be copies conform to the laws of the State of California, and is entitled by said laws to record in said office.

[SEAL.] J. W. McKINLEY.

Record, page 231.

STATE OF CALIFORNIA. } ss.
COUNTY OF LOS ANGELES. }

I, C. H. Dunsmoor, do hereby certify that J. W. McKinley, whose name is signed to the annexed certificate was at the time of signing the same, duly commissioned, qualified and acting as presiding Judge of Department number six (6) of the Superior Court of the County of Los Angeles, State of California, and I further certify that his signature thereto is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Superior Court this 14th day of April, A. D., 1890.

[SEAL.] C. H. DUNSMOOR,

County Clerk and *ex officio* Clerk of the Superior Court of Los Angeles County, of California."

Record, page 231.

Section 8 of the Statutes of California, 1850, chapter 58, page 151, is as follows:

"Sec. 8. The Recorder shall provide an official seal to be kept in his office and to be used by him in his official capacity. *'He may, however, use his private seal until an official seal can be procured.'* "

Section 1931 of 3 Deering's California Statutes reads as follows:

"Sec. 1931. A public seal in this state is a stamp or impression made by a public officer with an instrument provided by law to attest the execution of an official or public document, upon paper or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of the pen, or by writing the word "seal" against the signature of the writer.

A scroll or other sign made in a sister state or foreign country, and there recognized as a seal, must be so regarded in this state."

Section 1932 of the same statutes is as follows:

"Sec. 1932. There shall be no difference hereafter in this state between sealed and unsealed writings. A writing under seal may therefore be changed or altogether discharged by a writing not under seal."

If the seal used as his official seal upon his certificate by the Recorder, John W. Francis, was his private seal, the certificate would be good, there being no proof made that an official seal had been procured for his office.

The certificate of the presiding Judge, J. W. McKinley, states that the attestation of the copy of the patent is "in due form and made by the proper officer."

We submit that the the Court erred in rejecting this evidence.

XI.

In respect of the points made in the brief on the other side touching the order of the Court below, staying execution for thirty days, in order that the plaintiff below might deposit its deeds and transfers of stock for the information of the defendant, we have to say that, while it is true that the Court had the power to stay execution, it is not true that it had the power to do anything for the relief of the defendant in case the deeds and transfers of stock should not conform to the contract. It could not reverse its judgment for any such reason, or take any other step as a Court of Equity might, in respect of enforcing the real rights of the parties on the whole transactions. We submit, therefore, that the order of stay and its provisions can have no effect either way upon the rights of the parties here. The Court had on the trial refused to allow the defendant to give evidence tending to show that he had been misled and defrauded (p. 175) or to give evidence to show what was meant by the ambiguous phrase respecting the nature of the water stock named in the contract (pp. 169, 173), and having so done, its stay of execution could work no security to the defendant, for it would have no powdr to do anything in respect of that very cause, if the plaintiff had not deposited any deeds or transfers of stock. In all these general aspects of the case, then, the question recurs, whether the plaintiff was entitled to recover upon the mere proof of the execution of the agreements and the nonpayment by the defendant, irrespective of any explanation of the meaning of the alleged ambiguous phrase about water, and irrespective of the want of any tender of performances on its part.

If the agreements were dependent and the plaintiff was not entitled to recover without tender of performance, it follows of course that the judgment below was wrong.

If the plaintiff was entitled to recover upon its appearing without tender of performance that it was ready and willing to perform, then the proof of its readiness to do so utterly fails, for it is insisted no such stock representing a definite amount of water for which the defendant was to pay and to be entitled to as of right, existed or could be delivered.

BENTON HANCHETT,
Attorney for Plaintiff in Error.

GEO. F. EDMUNDS,
Of Counsel.